

(23,477)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 86.

JOSEPH F. GUFFEY, A. S. GUFFEY, E. N. GILLESPIE, AND
ROBERT PITCAIRN, JR., COPARTNERS, ETC., PETI-
TIONERS,

vs.

JAMES A. SMITH, J. W. SOLLEY, C. F. JOHNSON, WALTER
HENNIG, AND THE OHIO OIL COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE SEVENTH CIRCUIT.

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a In the United States Circuit Court of Appeals for the Seventh Circuit, October Term, A. D. 1910.

No. 1856.

JAMES A. SMITH, J. W. SOLLEY, C. F. JOHNSON, WALTER HENNING,
and THE OHIO OIL COMPANY, Appellants,

vs.

JOSEPH F. GUFFEY, A. S. GUFFEY, E. N. GILLESPIE, ROBERT PIT-
cairn, Jr., Copartners, Trading as Guffey, Gillespie & Pitcairn,
Appellees.

Appeal from the Circuit Court of the United States for the Eastern
District of Illinois.

Mr. Jay A. Hindman, Mr. Abram Simmons, Counsel for Appel-
lants.

Mr. James H. Beal, Mr. Arthur E. Young, Mr. A. L. Lowe, Mr.
Charles Troup, Counsel for Appellees.

1 *Placita.*

Pleas in the Circuit Court of the United States for the Eastern
District of Illinois, at a Regular Term Thereof Begun and Held
in the United States Court-house, in the City of Danville, in said
District, on the First Monday (Being the 6th Day) of March,
in the Year of our Lord One Thousand Nine Hundred and
Eleven and of our Independence the One Hundred and Thirty-
fifth Year.

Present: Hon. Francis M. Wright, Judge of the District Court
of the United States for the Eastern District of Illinois, sitting alone
as Judge of the Circuit Court.

Be it remembered that heretofore on to-wit, March 24, 1908,
there was filed in the office of the Clerk of said Court a Bill of
Complaint in the case of Joseph F. Guffey, et al. vs. Smith, et al.,
which said bill of complaint is in the words and figures following
to-wit:

2 In the Circuit Court of the United States for the Eastern District of Illinois.

Filed Mar. 24, 1908.

No. 330. In Chancery.

JOSEPH F. GUFFEY, A. S. GUFFEY, E. N. GILLESPIE, ROBERT PITCAIRN, JR., Copartners, Trading as Guffey, Gillespie & Pitcairn,
vs.

JAMES A. SMITH, H. E. WILCOX, J. W. SOLLEY, C. F. JOHNSON, Walter Hennig, The Ohio Oil Company, a Corporation; Perry A. Little, and Louis E. Willett.

To the Honorable the Judges of the Circuit Court of the United States for the Eastern District of Illinois:

Your orators Joseph F. Guffey, A. S. Guffey, E. N. Gillespie, Robert Pitcairn, Jr., co-partners trading as Guffey, Gillespie & Pitcairn, bring this their bill of complaint against James A. Smith, H. E. Wilcox, J. W. Solley, C. F. Johnson, Walter Hennig, The Ohio Oil Company, a corporation, Perry A. Little and Lewis E. Willett, defendants and humbly complaining show and represent unto your honors, as follows:

That your orators Joseph F. Guffey, A. S. Guffey, E. N. Gillespie and Robert Pitcairn, Jr., co-partners trading as Guffey, Gillespie & Pitcairn are each citizens and residents of the State of Pennsylvania; that the defendant- James A. Smith, H. E. Wilcox, J. W. Solley, C. F. Johnson and Walter Hennig are all citizens of the State of Illinois and residents of the Eastern District thereof; that the defendant The Ohio Oil Company is a corporation duly organized under and existing by virtue of the laws of the State of Ohio and as such a citizen thereof; that the defendants Perry A. Little and Lewis E. Willett are citizens of the State of New York.

That the amount in controversy on this case is of the reasonable value of the more than Two Thousand Dollars exclusive — interest and costs.

That on and prior to the 22nd day of May A. D. 1905, one James A. Smith, one of the defendant- hereinafter named, was seized in fee of the following described real estate situate

3 in the County of Crawford, and State of Illinois, to-wit:

The west half of the north east quarter of the north east quarter of Section 11, Township 8 North, Range 14 West, containing twenty (20) acres;

And being so seized, on the said 22nd day of May 1905, for a valuable consideration to him then and there paid by one M. A. Walton sold and by a certain instrument in writing, commonly called an "Oil and Gas Lease", by him duly executed, sealed, acknowledged and delivered, conveyed and leased said premises to the said M. A. Walton for the purpose of developing and operating the same for oil and gas.

Your orators further represent and show unto your honors that on the 13th day of November A. D. 1905 and for a long time prior thereto one R. L. Prosser was an employee and in the service of your orator as leaser, and as such it was his duty to procure leases, commonly called oil and gas leases, either from the owner of the land, or purchase the lease and leasehold estate, as the opportunity would offer. That your orators during said employment directed said Prosser to go to the State of West Virginia, where the said lessee M. A. Walton resided, for the purpose of purchasing said lease for your orators, and in pursuance of such direction, the said Prosser purchased said lease from said lessee and paid for the same with the money of your orators, and on or about said 13th day of November, 1905, the said M. A. Walton for a valuable consideration to him then and there paid by his written endorsement on said lease duly assigned, transferred, set over and delivered to the said Prosser, in trust, however, for your orators, all his (Walton) right, title and interest in and to said lease and leasehold estate, herein and thereby vesting the said R. L. Prosser with the legal title, and your orators with the equitable title, in and to said lease and leasehold estate, which said lease and the assignment thereof, are in the words and figures following, that is to say:

Agreement of May 22, 1905.

Agreement, Made and entered into the 22nd day of May, A. D. 1905, by and between James A. Smith of Licking T. P., County of Crawford and State of Illinois, party of the first part, and M. A. Walton party of the second part,

Witnesseth, that the said party of the first part, for and in consideration of the sum of One Dollars to — in hand well and truly paid by the said part- of the second part, the receipt of which is hereby acknowledged, and the covenants and agreements hereinafter contained on the part of the said party of the second part, to be paid, kept and performed, has granted, demised, leased and let and by these presents do grant, demise, lease and let unto the said part- of the second part, — heirs, executors, administrators and assigns, for the sole and only purpose of mining and operating for oil and gas, and of laying pipe lines, and of building tanks, stations and structures thereon to take care of the said products, All that certain tract of land situate in Licking Township, Crawford County and State of Illinois on the waters of —, bounded substantially as follows: West half of the N. E. of the N. E. of Sec. 11, Town 8, Range 14 West, all in Crawford County, Ill., containing 20 acres, more or less, and being the same and conveyed to the first part by —, reserving, however, therefrom 200 feet around the buildings on which no well shall be drilled by either party except by mutual consent.

It is agreed that this lease shall remain in force for the term of five years from this date, and as long thereafter as oil or gas, or either of them is produced therefrom by the party of the second part, there heirs, executors, administrators or assigns.

In Consideration of The Premises the said part of the second part covenants and agrees; 1st—To deliver to the credit of the first party, his heirs or assigns, free of cost, in the pipe line to which it may connect its wells, the equal $\frac{1}{8}$ part of all oil produced and saved from the leased premises; and 2nd—To pay \$100.00 Dollars per year for the gas from each and every gas well drilled on said premises, the product of which is marketed and used off the premises said payment to be made on each well within sixty days after commencing to use the gas therefrom as aforesaid, and to be paid yearly thereafter while the gas from said well is so used.

Second part — Covenants and agrees to locate all wells so as to interfere as little as possible with the cultivated portions of the farm. And further, to complete a well on said premises within 9 months from the date hereof, or pay at the rate of 25 cents per yr. quarterly, in advance, for each additional three months such completion is delayed from the time above mentioned for 5 the completion of such well until a well is completed; and it is agreed that the completion of such well shall be and operate as a full liquidation of all rental under this provision during the remainder of the term of this lease. Such payments may be made direct to the lessor or deposited to his credit in Exchange Bank, Martinsville, Ill.

It Is Agreed that the second party is to have the privilege of using sufficient water from said premises to run all machinery necessary for drilling and operating thereon, and at any time to remove all machinery and fixtures placed on said premises; and, further upon the payment of One Dollars, at any time, by the part of the second part — heirs, successors or assigns, shall have the right to surrender this lease for cancellation, after which all payments and liabilities thereafter to accrue under and by virtue of its term shall cease and determine, and this lease become absolutely null and void.

Witness the following signatures and seals:

JAMES A. SMITH. [SEAL.]

Witness:

T. E. PIERCE.

STATE OF ILLINOIS,

County of Crawford, ss:

I, W. D. Holly, a Notary Public, in and for said County in the State aforesaid, do hereby certify that James A. Smith, single, personally known to me to be the same person whose name is subscribed to the foregoing instrument, appeared before me this day in person, and acknowledged that he signed, sealed and delivered the said instrument as his free and voluntary act, for the uses and purposes therein set forth.

Given under my hand and official seal, this ninth day of June, A. D. 1905.

[SEAL.]

W. D. HOLLY,
Notary Public.

6

Assignment of M. A. Walton.

STATE OF WEST VIRGINIA,
Marshall Co., To wit:

For and in consideration of the sum of Five Dollars, the consideration of which is hereby acknowledged, I, M. A. Walton, do hereby transfer, sell, assign, and set over the within lease, together with all covenants and agreements therein contained, to R. L. Prosser, being all that tract of land, situated in Licking Town, Crawford Co., Ill. of which James A. Smith, demised, leased and let unto the said M. A. Walton, containing 20 acres, more or less.

M. A. WALTON.

Signed and acknowledged before the undersigned, a Notary Public in and for County of Marshall, State of West Va., this 13th day of November 1905.

[SEAL.]

W. H. LOPER,
Notary Public.

And that said lease and the assignment thereof were afterwards and on or about the 15th day of June A. D. 1906, duly entered of record in Lease Record No. 1, on page 450, in the Office of the Recorder of Deeds of said County of Crawford.

Your orators further represent and show unto your honors that afterwards and on or about the 26th day of December A. D. 1905 the said R. L. Prosser in furtherance of his duties under such employment and in such trust capacity, by his written assignment on said 26th day of December, assigned, transferred and set over, unto your orators the legal title in said lease and leasehold estate as aforesaid, and your orators then and there became, and from thence hitherto have been, and now are invested with both the legal and equitable title to said lease and leasehold estate, which said assignment is in the words and figures following, viz:

7 *Re-assignment of R. L. Prosser.*

STATE OF W. VA.,
Marshall Co., To wit:

Dec. 26th, 1905.

For and in consideration of the sum of One Dollar, the receipt of which is hereby acknowledged, I, R. L. Prosser, do hereby transfer, sell, re-assign and set over the within lease, together with all covenants and agreements therein contained, to E. N. Gillespie, of Freeport, Pa., it being all that tract of land situated in Licking Twp., Crawford Co., Ill., of which James A. Smith delivered, leased and let unto M. A. Walton and assigned to the said R. L. Prosser the 13th day of Nov., 1905, containing 20 acres, more or less.

In Witness Whereof, I set my hand and seal this 26th day of Dec. 1905.

R. L. PROSSER.

STATE OF W. VA.,
County of Marshall, ss:

I, C. Y. McCardle, a Notary Public, of said County of Marshall, do certify that R. L. Prosser, whose name is signed to the writing above, bearing date the 26th day of Dec., 1905, has this day acknowledged the same before me in my said County.

Given under my hand this 26th day of Dec., 1905.

[SEAL.]

C. Y. McCARDLE,
Said Notary Public.

Filed Mar. 24, 1908.

And that said assignment was afterwards, and on or about the 15th day of June A. D. 1906, duly entered of record in the office of the Recorder of Deeds of said County of Crawford on page 461 of Book 1 of leases in said office.

Your orators further show unto your Honors that for the purpose of aiding and facilitating the management of the business affairs of your orators in said County of Crawford, the assignment of the interest of said Prosser in said lease was (by mutual agreement and understanding between your orators) taken in the name of your said orator, E. N. Gillespie, yet such purchase and assignment were in fact made and taken for, and *was*, and *is* now the joint property of your orators, and said lease and all right, title and interest therein *is* now owned by them as such partners, as aforesaid.

8 Your orators further represent and show unto your honors, that they have been willing, ready and able, from the time they purchased said leasehold estate, and are now willing, ready and able, to enter upon said premises and fully develop the same for oil and gas in pursuance of the terms and provisions of said lease, and would have so developed the same long ere this, but for the fact of the collusion and confederation of the said James A. Smith as hereinafter alleged and set forth, and for these reasons neither your orators, not their assignors, have so developed said premises or any part thereof, but *he* is so, however, nevertheless, your orators who were at that time the owners of said lease and leasehold estate and all right and title therein, did on the 7th day of April, 1906, deposit to the credit of the said James A. Smith in "Exchange Bank" at Martinsville, Illinois, the sum of Five Dollars (\$5.00) in full payment of the rental due under said lease from the 22nd day of February A. D. 1906, to the said 22nd day of February, A. D. 1907, for delay in completing a well on said premises prior to the 22nd day of February, 1907, as is by the terms of said lease provided, the said "Exchange Bank" at Martinsville, Illinois, being the same bank the said James A. Smith named and appointed in said lease as his agent to receive such payments of rental for him; that on or about the 7th day of March, A. D. 1907, your said orators, still being the owners of said lease, deposited to the credit of said James A. Smith in the said "Exchange Bank" at Martinsville, Illinois, the further

sum of Two Dollars and fifty cents in full payment of the rental due under said lease from the 22nd day of February A. D. 1907, to the 22nd day of August A. D. 1907, for delay in completing a well on said premises prior to the 22nd of August, A. D. 1907, in pursuance of the terms of said lease.

That on or about the 31st day of July A. D. 1907, your said orators, still being the owners of said lease and leasehold estate, deposited to the credit of the said James A. Smith in said "Exchange Bank" at Martinsville, Illinois, the further sum of One Dollar and twenty-five cents, in full payment of the rental due said lease from the 22nd day of August, 1907, to the 22nd day of November A. D. 1907, for delay in completing a well on the said premises prior to the 22nd day of November A. D. 1907, in pursuance of the terms of said lease; that afterwards, and on or about the 7th day of November A. D. 1907, your orators, still being the owners of said lease and leasehold estate, deposited to the credit of the said James A. Smith in the said "Exchange Bank" at Martinsville, Illinois, the further sum of One Dollar and twenty five cents, in full payment of rental due under said lease from the 22nd day of November A. D. 1907, to the 22nd day of February A. D. 1908, in pursuance of the terms of said lease;

That afterwards, to-wit, on the 15th day of February, 1908 your orators still being the owners of said lease and leasehold estate deposited to the credit of the said James A. Smith in the said Exchange Bank the further sum of One & 25/100 Dollars in full payment of the rental due under said lease from the 22nd day of February A. D. 1908 to the 22nd day of May A. D. 1908 in pursuance of the terms of said lease; and that said various sums so deposited as aforesaid were intended by your orators to be, and they were, and are, in full payment and discharge of the various amounts due for delay in completing a well on said premises from the 22nd day of February A. D. 1906, to the 22nd day of May, A. D. 1908, as is by the terms of said lease provided.

Your orators further represent and show unto your honors, that on or about the 23rd day of March A. D. 1906, the said James A. Smith combines, colluded and confederated with one H. E. Wilcox, one of the defendants hereinafter named, to cheat, defraud and wrong your orators out of their just rights and leasehold estate, (the said Wilcox then and there well knowing of the rights of your orators therein), and in pursuance of their design to cheat and defraud your orators, on said 23rd day of March, the said James A. Smith wrongfully and corruptly executed and delivered to the said Wilcox a pretended oil and gas lease, in and by which said pretended oil and gas lease the said James A. Smith attempted to lease the West half of the North East quarter of the North East quarter of Section 11, Town. 8 N., Range 14 West containing twenty acres, which said pretended lease is in the words and figures following, that is to say:

Lease, Dated Mar. 23, 1906.

"In Consideration of the sum of One Dollar, the receipt of which is hereby acknowledged James A. Smith of the first party hereby grant- and guarantee- unto H. E. Wilcox second party all the oil and gas in and under the following described premises, together with the right to enter thereon at all times for the purpose of drilling and operating for oil and gas and to erect and maintain all
10 buildings and structures and lay all pipes necessary for the production and transportation of oil or gas.

The first party shall have one-eighth (1/8) part of oil produced and saved from said premises, to be delivered in the pipe line which second party may connect all wells, all that certain lot of land situated in the Township of Licking, County of Crawford in the State of Illinois described as follows, to-wit:

On the North by lands of Millard Payne;

One the east by lands of D. I. Bline;

On the south by lands of D. I. Bline;

On the west by lands of Susannah Smith being the West 1/2 of the N. E. 1/4 of Sec. 11.

This lease is given to take the place of an old lease that has been given heretofore that is no longer in force and containing twenty acres more or less.

To have and to hold the above described premises on the following conditions for and during the term of five years from the date hereof and as long after said term of years as oil or gas can be found on said real estate in paying quantities or the rental is paid thereon as hereafter herein provided.

If gas only is found in sufficient quantities to transport second party agrees to pay first party at the rate of \$100 Dollars annually for the product of each and every well when sold off premises and the first part- to have gas free of cost for heating and lighting purposes in dwelling house.

Second party shall bury all oil and gas lines when same interfere with cultivation and pay all damage done to growing crops by reason of operating under this grant.

In case no well is commenced within ninety days from this date then this grant shall become null and void unless second party shall thereafter pay at the rate of Five Dollars per acre for each year such completion is delayed each month in advance. A deposit to the credit of the first party in Eagle Bank of Casey, Ill., will be good and sufficient payment for any money falling due on this grant. First party has right to locate roads to and from places of operations and all gates to be kept closed by second party after passing by them or their employees.

Second party agree to pay One Hundred Dollars to first party for the first location when the same is made and drill one
11 well to each ten acres until the lease is drilled out and to pay One Hundred Dollars for each of the followingd locations as they are made, providing oil is found in paying quantities in the

first and each succeeding well. Second party agrees to stand any expense or damage that may arise from any lease.

The second party shall have right to use sufficient gas, oil and water to run all machinery for operating said wells, also the right to remove all its property at any time and may at any time on payment of — Dollars to the part- of the first part surrender this lease for cancellation after which all payments and liabilities thereafter to accrue under and by virtue of its terms shall cease and determine.

It is understood between the parties to this agreement that all conditions between the parties to this agreement *that all conditions between the parties* hereunto shall extend to their heirs, executors, successors and assigns.

In Witness Whereof the parties hereunto set their hands and seals this 23rd day of March A. D. 1906.

JAMES A. SMITH.

J. M. MILDREW.

STATE OF ———,
County of ———, ss:

Before me ——— a Notary Public in and for said County aforesaid personally appeared ——— and acknowledged the execution of the foregoing lease.

Witness my hand and notarial seal this — day of — 19—.

Notary Public.

And that said pretended lease was afterwards, and on or about the 14th day of June, 1906, duly entered of record in Lease Record No. 1, at page 417 of the Records of the Recorder's Office of said County of Crawford, in and by which said pretended lease the said James A. Smith granted and leased the said premises to the said defendant

12 H. E. Wilcox, expressly subject to all the terms and conditions of the said lease of your orators, and he, the said Wilcox, so accepted said lease, which said pretended lease was from its execution and delivery and now is absolutely null and void and in fraud of the rights of your orators, but remains on said record unreleased, and a cloud on the title of your orators, and should be released of record by the said H. E. Wilcox and said lease surrendered up for cancellation.

Your orators further represent and show unto your honors, that on the same day, to-wit, the 23rd day of March, A. D. 1906, in further pursuance of the design of the said James A. Smith and the said H. E. Wilcox to injure, cheat, defraud and wrong your orators, the said James A. Smith executed and delivered to the said H. E. Wilcox another pretended oil and gas lease in and by which he attempted to lease to said Wilcox for the purpose of developing and producing oil and gas therefrom the said lands last hereinbefore described, which said pretended lease is in the words and figures following, that is to say:

"In Consideration of The Sum of One Dollar, the receipt of which is hereby acknowledged James A. Smith of the first party hereby grant- and guarantee- unto H. E. Wilcox second party all the oil and gas in and under the following described premises together with the right to enter thereon at all times for the purpose of drilling and operating for oil and gas and to erect, and maintain all buildings and structures and lay all pipes necessary for the production and transportation of oil or gas. The first party shall have on- eighth ($1/8$) part of oil produced and saved from said premises to be delivered in the pipe line which second party may connect all wells namely: All that certain lot of land situated in the Township of Licking County of Crawford in the State of Illinois described as follows, to-wit:

On the north by lands of — — —;

On the east by lands of — — —;

On the south by lands of — — —;

On the west by lands of — — —;

West $1/2$ of the N. E. of the N. E. of Sec. 11, Town 8, Range 14 West containing 20 acres *containing twenty acres* more or less.

To have and to hold the above described premises on the following conditions for and during the term of five years from the date hereof and as long after said term of years as oil or gas can be found
13 on said real estate in paying quantities or the rental is paid thereon as hereafter herein provided:

If gas is found in sufficient quantities to transport second party agrees to pay first party at the rate of 100 Dollar- annually, for the product of each and every well when sold off premises and the first party to have gas free of cost for heating and lighting purposes in dwelling house.

Second party shall bury all oil and gas lines when same interfere with cultivation and pay all damages done to growing crops by reason of operating upon this grant.

In case no well is commenced within ninety days from this date then this grant shall become null and void unless second party shall thereafter pay at the rate of five Dollars per acre *Dollars* for each years such completion is delayed. A deposit to the credit of the first party in Eagle Bank Casey, Ill. will be good and sufficient payment for any money falling due on this grant. First party has right to locate roads to and from place of operation and all gates to be kept closed by second party after passing by them or their employees.

Second party agree- to pay first party the sum of One Hundred Dollars for the first location when the same is made and to drill one well to each ten acres until the lease is drilled out and to pay one hundred dollars for each of the following locations as they are made, provided oil is found in paying quantities in the first and each *preceding* well and to pay the same rental as above mentioned until oil is transported after produced in paying quantities.

Second party agrees to commence a well on said premises within one month from date or pay to first party at the rate of Ten Dollars for each month thereafter the completion of said well is delayed.

All moneys falling due under the terms of this lease to be paid direct to first part.

In further consideration of the payment of one dollar first party grants unto the second party the exclusive option and right to release and terminate this grant or any undrilled portion thereof at any time; thereafter all liabilities of said second party as to the portion released shall cease and determine.

The second party shall have the right to use sufficient gas, oil and water to run all machinery for operating said wells also the right to remove all its property at any time and may at any time

on payment of One Dollar to the party of the first part surrender this lease for cancellation after which all payments and liabilities thereafter to accrue under and by virtue of its terms shall cease and determine.

It is understood between the parties to this agreement that all conditions between the parties hereunto shall extend to their heirs, executors, successors and assigns.

In witness whereof, the parties hereunto set their hands and seals this 23 day of March A. D. 1906.

JAMES A. SMITH.

THOMAS WELSH.

(Margin:) 2nd party agrees to stand any expense or damage that may arise from an old lease.

STATE OF ILLINOIS,

County of Clark, ss:

Before me Dan B. Kelly a Notary Public in and for said County aforesaid personally appeared James A. Smith and acknowledged the execution of the foregoing lease.

Witness my hand and notarial seal this 23rd day of March 1906.

[SEAL.]

DAN B. KELLY,
Notary Public, Casey, Illinois."

Filed Mar. 24, 1908.

And that said pretended lease was afterwards, and on or about the 13th day of June, A. D. 1906, duly entered of record in the Recorder's office of said County of Crawford in Lease Record No. 5, at page 12 thereof, in and by which said pretended lease the said James A. Smith granted and leased said premises to the said H. E. Wilcox, expressly subject to all the said terms and conditions of the said lease of your orators, and he, the said Wilcox, with full knowledge of your orators' prior lease on the premises and of their rights therein and thereunder, so accepted said lease, and which said pretended lease was, from its execution and delivery, and now is, absolutely null and void, and in fraud of the rights of your orators, but remains on said record unreleased and is a cloud on your orators'

title, and should be released of record by the said H. E. Wilcox and said lease surrendered up for cancellation.

15 Your orators further represent and show unto your honors, that on or about the 9th day of August, 1906, the said James A. Smith colluded and confederated with one C. E. Allison to injure and defraud your orators, and in pursuance of such collusion and confederation and for the purpose of cheating and defrauding your orators out of their just rights the said James A. Smith on the said 9th day of August, 1906, pretended to execute and deliver to the said C. E. Allison a certain instrument in writing purporting to be an oil and gas lease for the purpose of developing and producing oil and gas therefrom, the following described real estate situate in the said County of Crawford, namely: The west half of the north east quarter of the north east quarter Section 11, Town 8 N. R. 14 W. containing 20 acres, more or less, which said pretended lease is in the words and figures following, that is to say:

Lease, Dated Aug. 9, 1906.

"In Consideration of the sum of One Dollar, the receipt of which is acknowledged by the first party James A. Smith single man first party hereby grants and conveys unto C. E. Allison second party all the oil and gas in and under the premises hereinafter described together with said premises for the purpose and with the exclusive right to enter thereon at all times by himself, agents, and employees to drill and operate wells for oil, gas and water, and to erect, maintain, occupy, repair and remove all buildings, poles and rods, structures, pipe lines, machinery and appliances that second party may deem necessary, convenient or expedient to the production of oil and gas thereon and the transportation of oil and gas on, upon and over said premises and the highways along the same. If oil is found in paying quantities the first party shall have the full one sixth part of all oil produced and saved on the premises to be delivered free of coast in the pipe lines to which the wells may be connected.

Said real estate and premises are located in Crawford County, Illinois and described as follows, to-wit: W. $\frac{1}{2}$ N. E. of N. E. of Sec. 11, Town 8, Range 14 containing 20 acres more or less, hereby releasing and waiving all right under and by virtue of the Homestead Exemption laws of this State.

To have and to hold said premises for said purpose for the term of five (5) years from this date and so long thereafter as gas or oil is produced thereon. In case no well is — from date this lease shall be null and void without further agreement between said
16 parties. Completed in 90 days.

It is agreed that while the product of each well in which gas only is found shall be marketed from said premises, the second party will pay to the first party therefor at the rate of One Hundred Dollars per annum and give the first party free gas for domestic purposes at the dwelling house during the same time. Whenever first party shall request it, second party shall bury—all oil and gas

lines which are laid over tillable ground. Second party also agrees to pay all damage done to crops by reason of laying or removing pipe lines. No well to be nearer than 200 feet of residence buildings on premises without written consent of first party.

Second party agrees to pay on completion of first producing well of ten barrels or better fifteen Dollars per acre for said land. If well is not drilled or rental paid as agreed this lease is null and void.

Second part- shall have the right to use sufficient gas, oil and water to drill all wells and for all purposes necessary or convenient in operating the same.

The terms and conditions of this grant shall extend to the heirs, successors and assigns of the parties hereto.

In Witness Whereof the parties have hereto set their hands and seals this 9th day of Aug. 1906.

JAMES A. SMITH. [SEAL.]
C. F. ALLISON. [SEAL.]

Witness.

M. E. HARRIS.

STATE OF ILLINOIS,
Crawford County, ss:

I W. D. Holly a Notary Public in and for the said County in the State aforesaid do hereby certify that James Smith single C. E. Allison married as aforesaid personally known to me to be the same person whose name is subscribed to the foregoing instrument appeared before me this day in person and acknowledged that he signed, sealed and delivered the said instrument, waiving right of Homestead and Exemption laws as his free and voluntary act for the uses and purposes therein set forth.

17 Given under my hand and official seal this 31st day of August, A. D. 1906.

[L. S.]

W. D. HOLLY,
Notary Public.

And that said pretended lease to the said C. E. Allison was on or about the 28th day of January A. D. 1907, duly entered of Record on Book 6, on page 474 thereof of Lease Records in the office of the Recorder of Deeds of said County. That afterwards and on or about the first day of September A. D. 1906, the said C. E. Allison by his written assignment attempted to assign, transfer and set over to one Lewis E. Willett the entire interest of the said C. E. Allison in and to said last mentioned pretended lease, which said pretended assignment is in the words and "figures following, namely:

Assignment of C. E. Allison.

"For and in consideration of the sum of One Dollar and other good and sufficient consideration, the receipt of which is herein acknowledged I, C. E. Allison hereby sell, assign, transfer and set

over unto Lewis E. Willett of Buffalo, New York, his heirs and assigns all my right, title and interest in and to the within instrument according to the terms and limitations thereof.

Dated this 1st day of September A. D. 1906.

C. E. ALLISON. [SEAL.]

STATE OF ILLINOIS,

Crawford County, ss:

I, William W. Arnold a Notary Public in and for said County do hereby certify that C. E. Allison personally known to me to be the same person whose name is subscribed to the foregoing instrument appeared before me this day in person and acknowledged that he signed, sealed and delivered the said instrument as his free and voluntary act for the uses and purposes therein set forth.

[L. s.]

WILLIAM W. ARNOLD,
Notary Public."

And that said pretended assignment was duly entered of record in said Lease Record 6, on page 475 as aforesaid, with said pretended lease:

That afterwards and on or about the 25th day of March A. D. 1907, and in furtherance of the design to cheat and defraud your orators the said Lewis E. Willett attempted to sell, assign and transfer all his interest in and to the said Allison pretended lease to J. W. Solley and C. F. Johnston, two of the defendants hereafter named, which said pretended assignment is in the words and figures following, namely:

Assignment of L. E. Willett to J. W. Solley et al.

"This Agreement made this 25th day of March, 1907, by and between Lewis E. Willett of Buffalo, New York, party of the first part and J. W. Solley and C. F. Johnston, party of the second part;

Witnesseth: The party of the first part for and in consideration of the sum of One Dollar and other valuable consideration to him in hand paid by the said party of the second part, the receipt whereof is hereby confessed and acknowledged, has sold, assigned and transferred and does hereby sell, assign, and transfer to the said party of the second part all interest, right and title to the following described oil and gas leases:

One Lease bearing date August 9, 1906, given by James A. Smith to C. E. Allison and covering land situated in Crawford County, Illinois, described as follows: W. $\frac{1}{2}$ N. E. $\frac{1}{4}$ of N. E. $\frac{1}{4}$ Sec. 11, Town 8, Range 14.

One Lease, bearing date August 1, 1906, given by Elsora Smith to C. E. Allison and covering lands situated in Crawford County, Illinois, described as follows: W. $\frac{1}{2}$ N. W. $\frac{1}{4}$ N. E. $\frac{1}{4}$ Sec. 11, Town 8, Range 14.

And one Lease given by Sarah Jane Payne and John Payne, husband and wife to C. E. Allison bearing date August 20, 1906, and covering lands situated in Crawford County, Illinois, described

as follows: South half of south west quarter of north east quarter Section 11, Town 8, Range 14 West, each lease containing 20 acres of land, more or less.

One Lease given by Susannah Smith to C. E. Allison bearing date August 9, 1906, and covering lands situated in Crawford County, Illinois, described as follows: Part of the north west quarter of the north east quarter Section 11, Town 8, Range 14 West, containing 30 acres, more or less.

All of said leases having been heretofore duly assigned to said Lewis E. Willett, who hereby guarantees to protect and defend title under same to said J. W. Solley and C. F. Johnston.

It is understood and agreed that all machinery, tools, tankage, pipes, apparatus and all other appurtenances belonging to or
19 in any wise appertaining to said leases, or any of them; also all oil or gas heretofore or hereafter produced on said leases, or any of them, to which the said party of the first part has any title or interest is hereby assigned and transferred to the party of the second part.

In Witness Whereof, the party of the first part has hereunto set his hand and seal the day and year above mentioned.

LEWIS E. WILLETT. L. S.]

STATE OF ILLINOIS,

County of Clark, ss:

On this the 25th day of March 1907, before me the subscriber personally appeared Lewis E. Willett, to me personally known to be the same person described in and who executed the foregoing instrument, and he duly acknowledged to me that he executed the same.

[SEAL.]

DOIT YOUNG,
Notary Public."

Filed Mar. 24, 1908.

And that afterwards and on or about the first day of April, A. D. 1907, said pretended assignment was duly entered of Record in Book 8, on page 437, of the Miscellaneous Records of the Office of the Recorder of Deeds of said County of Crawford.

Your orators further represent and show unto your honors, that at the time of the making of the said last pretended lease and the respective pretended assignments thereof they were taken and made with full knowledge of the interest of your orators, and in fraud of their rights therein.

That the record of said last pretended lease and the said pretended assignments thereof and each of them was then and is now, a cloud upon your orators' title in said premises and in equity and good conscience should be removed as such.

Your orators further represent and show unto your honors they are advised and so charge the fact to be, that on or about the 28th day of March A. D. 1907 the said J. W. Solley and C. F. Johnston became and were indebted to Perry A. Little and Lewis E. Willett

of the City of Buffalo in the County of Erie and State of New York, two of the defendants hereinafter named, in the sum of \$20,000.00 as a part of the purchase price of various pretended oil and gas leases and leasehold estate attempted to be purchased by said Solley and Johnston of said Perry A. Little and Lewis E. Willett, or one of them which with other lands includes the land hereinabove described and as evidence of said indebtedness on said 28th day of March the said Solley and Johnston executed and delivered to the said Perry A. Little and Lewis E. Willett their five certain promissory notes each for the sum of \$4000.00 payable in one, two, three, and four and five months after date respectively, with six per cent. per annum interest from date, and to secure the payment of each of said notes, the said J. W. Solley and C. F. Johnston attempted to make, execute and deliver to the said Perry A. Little and Lewis E. Willett their certain Mortgage Deed of same date of said notes, in and by which they attempted to convey to the said Perry A. Little and Lewis E. Willett, among other land the leasehold estate on that certain lease made by James A. Smith to C. E. Allison on Aug. 9th, 1906 upon 20 acres of land in said County of Crawford described as follows: The West half of the North East quarter of the North East quarter of Section 11, in Township 8 North, of Range 14 West, and which said pretended lease was afterwards recorded in Miscellaneous Record N. 6 on page 474 of the Miscellaneous Records of said County of Crawford; that said mortgage and the leasehold estate thereby attempted to be conveyed, is each null and void in so far as it appertains to the land last above described; That afterwards and on or about the first day of April, A. D. 1907 said pretended mortgage was entered of record on page 210 of Mortgage Record No. 64 of the Mortgage records of said County of Crawford, and thereupon and thereby became a cloud upon the title of your orators which said pretended mortgage and the record thereof are hereby referred to and the same made a part of this your orators' amended bill of complaint.

Your orators further represent and show unto your honors, they are advised, and believe it to be true and so charge the fact to be, that said five promissory notes, each for the sum of \$4000.00, so given by the said defendants J. W. Solley and C. F. Johnston to the said defendants Perry A. Little and Lewis E. Willett, as aforesaid, has each been paid off and fully discharged, but that said mortgage has not been cancelled or released of record as it should be.

21 Your orators further represent and show unto your honors, that said mortgage should be annulled, cancelled of record and released therefrom as a cloud upon your orators' title in so far as it appertains to the said lands hereinabove described.

Your orators further represent and show unto your honors that they are advised and believe it to be true, and so charge the fact to be, that said defendants, Solley and Johnston, have attempted to convey, some interest in their said pretended lease to one Walter Hennig who now claims an interest in said lease on said premises; but the records of this county do not disclose any interest in said

Hennig and your orators do not know what, if any, interest he claims, but his claim to any interest in any lease for oil and gas purposes upon the premises is in fraud of the rights of your orators, but is made with full knowledge thereof, and is a cloud on your orators' title thereto and in equity and good conscience should be removed as such.

Your orators further represent and show unto your honors, that the said lease given by the said James A. Smith to the said M. A. Walton on the 22nd day of May A. D. 1905, and afterwards by mesne assignments transferred to and now owned by your orators, is a good, valid and subsisting lease and in full force and effect, and that each and every of the other of said pretended leases so attempted to be given by the said James A. Smith as aforesaid, and the attempted assignments thereof, and the said Mortgage in so far as the same pertains to the above described land, and each of them, was, from the date of the respective delivery thereof, and is now absolutely null and void and of no force or virtue.

Your orators further represent and show unto your honors, that after the said defendants J. W. Solley and C. F. Johnston obtained said pretended assignment as aforesaid, and prior to their entrance on said premises, on to wit: the first day of April, A. D. 1907, your orators caused a written notice of their claim, interest and right in and under said lease to the said Walton and afterwards assigned to them, as aforesaid, to be served on said defendants, Solley and Johnston, forbidding and commanding them, the said J. W. Solley and C. F. Johnston, their agents, attorneys, employees, helpers, servants, representatives and assigns, and each of them to

22. refrain from entering upon said premises or any part thereof and that if they entered upon said premises and produced oil or gas therefrom they would do at their peril, and that your orators would claim and assert all their rights therein; Yet, notwithstanding such notice so given to them, the said J. W. Solley and C. F. Johnston, in utter disregard of the rights of your orators and in furtherance of their design to cheat, injure, wrong and defraud your orators, further colluded and conspired with the said James A. Smith, and secretly and fraudulently entered said premises, without the knowledge or consent of your orators, or either of them, and developed several oil and gas wells, and have produced and sold large quantities of the oil and gas in and under said premises, and converted large sums of money as the proceeds and benefits derived therefrom to their own use to the great loss and damage of your orators, and decline and refuse to discover the amount of oil and gas received by them, and pay the proceeds thereof over to, your orators as they should do.

Your orators further represent and show unto your honors, that the said J. W. Solley and C. F. Johnston are still continuing to further develop said premises, and unless restrained by the order of this Court, will drill other wells and produce and sell more and other oil and gas from said premises to the great and irreparable loss and injury of your orators.

Your orators further represent and show unto your honors, that they are advised and believe it to be true and so charge the fact to

be that the said defendants, Solley and Johnston, have sold and delivered unto the Ohio Oil Company, a corporation, another defendant hereinafter named, large quantities of oil produced and delivered from said premises belonging to your orators, and that said defendant The Ohio Oil Company, has not discovered or paid over to the said Solley and Johnston, or to any one for them, or to any person legally entitled thereto, but are still holding the amount due thereon, ready and willing to pay the same to whomsoever this honorable court may direct.

Your orators further represent and show that they have, on their own motion, and not at the request of the said Ohio Oil Company, duly notified the said Ohio Oil Company they claimed to own the above mentioned oil, and would demand the payment therefor and directed the said Ohio Oil Company *to* not to pay the same to said defendants, Solley and Johnston and if it so paid said amount it would do so at its peril.

23 Your orators further represent and show unto your honors, that they do not know and have no means of ascertaining, save by a discovery from the defendants J. W. Solley, C. F. Johnston, Walter Hennig, and the Ohio Oil Company, the exact amount and value of oil and gas produced from the premises and converted and sold by the defendants J. W. Solley, C. F. Johnston and Walter Hennig, or by each and by all of them.

Forasmuch, therefore, as your orators are wholly without a remedy, except in a court of equity, where matters of this sort are properly cognizable and relievable, they make the said James A. Smith, H. E. Wilcox, J. W. Solley, C. F. Johnston, Walter Hennig, Perry A. Little, Lewis E. Willett and the Ohio Oil Company, a corporation, parties defendant to this, their bill of complaint, and pray that they, and each of them, may be required to make true, direct, full and complete answer to the same, (but not under oath, their answer under oath being hereby expressly waived), and that upon a final hearing of this cause your honors will grant a decree herein ordering, adjudging and decreeing: That the said lease given by the said James A. Smith to the said M. A. Walton on the 22nd day of May A. D. 1905, and now owned by your orators, is the only valid and subsisting lease for oil and gas purposes on said premises; That the said defendants, James A. Smith, H. E. Wilcox, J. W. Solley, C. F. Johnston and Walter Hennig, their agents, attorneys, representatives, employees, helpers, servants, heirs and assigns, and each of them, be perpetually enjoined and restrained from entering upon or trespassing upon said premises, from further operating or developing the same, or from producing or selling any oil, gas or thing of value therefrom, from collecting the amount due from any products sold from said premises, or from removing any property, real, personal or mixed, therefrom, by whomsoever placed thereon; That said persons and each of them, also be restrained from in any manner whatsoever interfering with or hindering your orators, their agents, representatives, servants, helpers and employees, or either of them, from entering upon and managing, operating, controlling, developing and using said premises, and all the improvements thereon or appurtenances thereunto be-

longing or in any wise appertaining to any manner under the terms of said lease as they may desire, and selling and disposing of the products therefrom; That the said defendants J. W. Solley, C. F. Johnston and Walter Hennig, and each and every of them, be required to discover the amount of all the oil, gas and other thing of value, they, or either or any, of them, have produced, consumed and converted to their own use, as well as all products by them sold from said premises, and a decree rendered in favor of your orators against the said J. W. Solley, C. F. Johnston and Walter Hennig or such of them as have received benefits therefrom for the full value of all of said products, so produced and converted to their use as aforesaid: That the said pretended leases from the said James A. Smith to the said defendant H. E. Wilcox and each of them, be surrendered up for cancellation, and the respective records thereof cancelled, released, annulled, set aside and for nothing held: That the said pretended lease from the said James A. Smith to the said C. E. Allison, and the pretended assignments thereof and each of them, including any that may be claimed by the said defendant Walter Hennig, be surrendered up for cancellation and the records thereof, and each of them be cancelled, released, annulled, set aside and for nothing held: That the said pretended mortgage and the record thereof may be annulled, set aside and released of record and for nothing held in so far as it pertains to the above described lands, and to the interests of your orators therein: That a discovery may be made by the said defendant The Ohio Oil Company of all the oil, and the value thereof, purchased or received, by it from the said J. W. Solley, C. F. Johnston and Walter Hennig, or either of them from said premises, and for which it has not paid any person at the direction of your orators and a decree rendered against said Ohio Oil Company to pay any amount it may owe—if any—for such oil to your orators, and that your orators may have such other and further relief in the premises as the nature of their case may require, and to your honors shall seem meet and proper, and your orators will ever pray etc.

May it please your honors to grant unto your orators a subpoena in Chancery directed to the Marshal of said District commanding that he summon the above named defendants James A. Smith, H. E. Wilcox, J. W. Solley, C. F. Johnston, Walter Hennig, The Ohio Oil Company, Perry A. Little and Lewis E. Willett to be and appear before your honorable court on the first day of next term to be held at Danville in said Eastern District of Illinois.

JOSEPH F. GUFFEY,

A. S. GUFFEY,

F. N. GILLESPIE,

ROBERT PITCAIRN, JR.,

*Copartners, Trading as Guffey,
Gillespie & Pitcairn,*

By CHAS. GIBBS CARTER.

Of Their Sols.

CALLAHAN JONES LOWE,
GOLDEN, SCHOLFIELD & SCHOLFIELD,
PARKER & CRAWLEY,
CHAS. GIBBS CARTER,

Solicitors for Complainants.

STATE OF ILLINOIS,
County of Crawford, ss:

Before me the undersigned authority personally appeared E. N. Gillespie, one of the complainants in the within Bill of Complaint, who being duly sworn according to law, did depose and say that he is a member of the firm of Guffey, Gillespie & Pitcairn, complainants in the foregoing bill and that he has knowledge of the facts therein set forth; that the facts set forth in said bill are true, excepting so far as they are therein stated to be upon information and belief and so far as they are therein stated to be upon information and belief he believes them to be true and further saith not.

E. M. GILLESPIE.

Subscribed and sworn to before me this 23rd day of March A. D. 1908.

[SEAL.]

THOS. S. MOORE,
Notary Public.

26 Be It Further Remembered that on to-wit, March 24, 1908, there issued out of the office of the Clerk of said Court a Chancery Subpœna in said cause, which said Chancery Subpœna together with the return of the Marshal thereon is in the words and figures following, to-wit:

Subpœna.

THE UNITED STATES OF AMERICA,
Eastern District of Illinois, ss:

The United States of America to James A. Smith, H. E. Wilcox, J. W. Solley, C. F. Johnson, Walter Hennig, The Ohio Oil Company, a corporation; Perry A. Little, and Louis E. Willett, Greeting:

We command you and every of you, That you appear before our Judges of our Circuit Court of the United States of America, for the Eastern District of Illinois, at Danville, in said District, on the first Monday in the Month of May next, to answer the bill of complaint of Joseph F. Guffey, A. S. Guffey, E. N. Gillespie, Robert Pitcairn, Jr., co-partners trading as Guffey, Gillespie & Pitcairn, this day filed in the Clerk's office of said Court, in said City of Danville, then and there to receive and abide by such judgment and decree as shall then or thereafter be made, upon pain of judgment being pronounced against you by default.

To the Marshal of the Eastern District of Illinois to execute.

Witness, the Hon. Melville W. Fuller, Chief Justice of the United States of America, aforesaid, this 24th day of March, in the year of our Lord one thousand nine hundred and eight, and of our independence the one hundred and thirty-second year.

[SEAL.]

DANIEL HOGAN, Clerk.

Memorandum.

The above defendants are notified that unless they and each of them shall enter their appearance in the Clerk's office of said Court at Danville, aforesaid, on or before the day to which the above Writ is returnable, the complainant's bill will be taken against — as confessed, and a decree entered accordingly.

DANIEL HOGAN, *Clerk.*

27 UNITED STATES OF AMERICA,
Eastern District of Illinois, ss:

Marshal's Return.

UNITED STATES OF AMERICA,
Eastern District of Illinois, ss:

I have duly executed the within writ within my district in the following manner to-wit

Upon the Ohio Oil Company, a corporation, by reading and delivering a true copy thereof to James K. Kerr, President of said Company at Flat Rock, Illinois, and upon H. E. Wilcox by reading and delivering a true copy thereof to him at Robinson, Illinois, on the 30th day of March, 1908, upon James A. Smith at eight miles north-east of Yale, Illinois and upon J. W. Solley and Walter Hennig at Casey, Illinois, by reading and delivering a true copy thereof to each of them on the 31st day of March, 1908, and upon C. F. Johnson at Casey, Illinois by reading and delivering a true copy thereof to him on the 4th day of April, A. D. 1908.

The within named defendants, Perry A. Little and Louis E. Willett not found in my district.

CHARLES P. HITCH,
United States Marshal,
By ARCH SPRING, *Deputy.*

Marshal's fees \$19.86.

And afterwards on to-wit:—April 28th, 1908, came the defendants to said cause and filed in the office of the clerk of said court their demurrer to the bill of complaint herein, which said demurrer is in the words and figures following, to wit:

28 In the Circuit Court of the United States for the Eastern District of Illinois.

Filed Apr. 28, 1908.

In Chancery.

JAMES A. SMITH, H. E. WILCOX, J. W. SOLLY, C. F. JOHNSON,
WALTER HENNIG, PERRY A. LITTLE, and LOUIS WILLETT,
ats.

JOSEPH F. GUFFEY, A. S. GUFFEY, E. N. GILLESPIE, ROBERT PIT-
cairn, Jr., Copartners, Trading as Guffey, Gillespie and Pit-
cairn.

*The Demurrer of James A. Smith, Perry A. Little, Louis E. Wil-
let, J. W. Solley, and Walter Hennig, C. F. Johnson, and H. E.
Wilcox to the Bill of Complaint of Joseph F. Guffey, A. S. Guf-
fey, E. N. Gillespie, Robert Pitcairn, Complainants.*

These defendants by protestation not confessing or acknowledging all or any of the matters and things in the said bill of complaint contained to be true in the manner and form as they are in the said bill contained and stated, doth demur to the said bill of complaint and for causes of demur- doth show:

First. From the allegations of the said bill contained it is shown that the complainants or neither of them are in possession of the lands mentioned in the bill, nor have been at the time of the filing of the said bill nor previously or any part or parcel thereof. It does however appear from the said bill that the defendants have been and still are in the possession of the said lands at the time since and before the filing of the said bill. It is shown by the said bill that the defendants claims to own the said lands and that they are improved lands and occupied by the defendants, and were so at the time of the filing of the bill.

Second. If it was assumed that all the facts and things alleged in the said bill were true, the law affords a complete and adequate method of securing relief.

Third. There is no allegation in the said bill of com-
29 plaint, that the complainants made any offer or attempt to go upon the said lands and perform any of the covenants and agreements made on their part under the so called "Walton Lease."

Fourth. The supposed "Walton Lease" is invalid, and cannot be enforced by the complainants. It does not contain a mutuality of contract. It is incapable of being enforced against the second parties and assigns the complainants, as it contains a stipulation that the second party may at any time surrender the same for cancellation after which all the obligations of the lessees therein shall cease and determine, and said lease be null and void for which

reason equity will not enforce the same at the instance of the second parties and those holding under them.

Fifth. It appears from the allegations of the said bill of complainants as well as those from whom they claim interest have refused to comply with the agreements made on their part in the said lease by refusing to pay the rentals as was provided and for such refusal the lease has become forfeited and null and void.

Sixth. The complainants and those from whom they hold, have continually refused to comply with the express terms and obligations on their part in the said lease contained and so having refused to comply on their part equity will likewise refuse relief to enforce it against the other party to the said lease.

Seventh. The whole bill is entirely devoid of any grounds for equitable relief for the complainants. It does not set forth any equitable grounds for the interposition of the court.

Eighth. It does not make any allegation that the defendants are insolvent or that a suit at law would be unavailing for any purpose, but does show that a court of law is adequate to give any relief which may be consonant with justice in the premises.

Wherefore and for divers other good and sufficient reasons and causes of demur- in the said bill contained, those defendants demur to the said bill of complaint and all the matters and things in the said bill contained. They pray judgment of the court, whether they shall be required to make any further or different answer

to the said bill, and pray hence to be dismissed with their
30 costs in this behalf sustained

JAMES A. SMITH,
H. E. WILCOX,
J. W. SOLLEY,
C. F. JOHNSON,
WALTER HENNIG,
PERRY A. LITTLE,
LOUIS E. WILLETT,

Defendants.

By GEORGE W. JONES,
VALMORE PARKER,
S. J. GEE,

Solicitors for the said Defendants.

Appearance.

Filed July 20, 1908.

The defendants, Perry A. Little and Louis E. Willett come and enter their appearance and join in the above demurrer, this 20th day of July, A. D. 1908.

PERRY A. LITTLE,
LOUIS E. WILLETT,
Defendants.

A. SIMMONS AND
LINDLEY, PENWELL & LINDLE,
Solicitors for said Defendants.

In the Circuit Court of the United States for the Eastern District
of Illinois.

In Chancery.

JAMES A. SMITH, H. E. WILCOX, J. W. SOLLEY, C. F. JOHNSON,
WALTER HENNIG, PERRY A. LITTLE, and LOUIS WILLETT

VS.

JOSEPH F. GUFFEY, A. S. GUFFEY, E. N. GILLESPIE, ROBERT PIT-
CAIRN, JR., Copartners, Trading as Guffey, Gillespie & Pitcairn.

Proof of Service.

We hereby acknowledge receipt of a copy of the demurrer of
James A. Smith, H. E. Wilcox, J. W. Solley, C. F. Johnson,
31 Walter Hennig, Perry A. Little and Louis Willett, to the
bill of complaint in the above entitled cause.

Dated this 27th day of April, 1908.

CALLIHAN, JONES & LOWE,
Solicitors for Complainants.

In the Circuit Court of the United States for the Eastern District of
Illinois.

In Chancery.

JOSEPH F. GUFFEY, A. S. GUFFEY, E. N. GILLESPIE, ROBERT
PITCAIRN, JR., Copartners, Trading as Guffey, Gillespie & Pitcairn,

VS.

J. W. SOLLEY et al.

And now comes George W. Jones, Valmore Parker and S. J. Gee,
solicitors for the defendants in the above entitled cause and certify
that the demurrer filed in the said cause has been prepared by them
after having examined the bill of complaint of the complainants,
and that in the opinion of said solicitors for the defendants named
in the said demurrer, the points of law as therein alleged are well
founded in law and equity. That the said demurrer is presented
for that reason and no other.

GEORGE W. JONES,
VALMORE PARKER,
S. J. GEE,
Solicitors for Defendants.

Affidavit of Walter Hennig.

STATE OF ILLINOIS,
Clark County:

Walter Hennig, one of the above named defendants being sworn
says that the demurrer filed in the said cause by his solicitors has

been interposed by his said solicitors as a defense in good faith and not for the purpose or delay in the hearing of the said cause.
WALTER HENNIG.

32 Subscribed and sworn to this 29th day of April, 1908.
C. S. SCHILLING,
Notary Public.

Received a copy of the above and foregoing certificate and affidavit this 1st day of May, A. D. 1908.
[SEAL.] CALLAHAN, JONES & LOWE,
Sol. for Complainants.

Endorsed: Affidavit. Filed May 4th, 1908. Daniel Hogan,
Clerk.

And afterwards on to-wit:—May 5th, 1908, came the complainants, by their solicitors, and filed in the office of the clerk of said court a petition for an order of substituted service on absent defendants in the words and figures following, to-wit:—

Application for Order for Substituted Service.

In the Circuit Court of the United States for the Eastern District of Illinois.

JOSEPH F. GUFFEY, A. S. GUFFEY, E. N. GILLESPIE, ROBERT PITCAIRN, JR., Copartners, Trading as Guffey, Gillespie & Pitcairn,
vs.

JAMES A. SMITH, H. E. WILCOX, J. W. SOLLEY, C. F. JOHNSON, Walter Hennig, The Ohio Oil Company, a Corporation; Perry A. Little, and Louis E. Willett.

Petition for Order for Substituted Service.

Now comes the complainants by their Solicitors and show unto the Court that on to wit the 24th day of March 1907 they filed their Bill of Complaint in the Clerk's office of this Court against the above named defendants, and that on said date a Chancery Subpœna was issued out of the Clerk's office of this Court directed to the above named defendants commanding them to appear before
33 this Court on the first Monday of May A. D., 1908 and then and there to plead, answer, demurrer, except or otherwise defend said Bill.

That on the 8th day of April A. D. 1908 said Chancery Subpœna was returned into said Clerk's office with the following indorsement thereon:

UNITED STATES OF AMERICA,
Eastern District of Illinois, ss:

I have duly executed the within writ within my district in the following manner, to-wit:—

Upon the Ohio Oil Company, a corporation, by reading and delivering a true copy of same to James K. Kerr, President of said company at Flat Rock, Illinois, and upon H. E. Wilcox by reading and delivering a true copy thereof to him at Robinson, Illinois on the 30th day of March 1908; upon James A. Smith at Eight miles north-east of Yale, Illinois and upon J. W. Solley and Walter Hennig at Casey, Illinois by reading and delivering a true copy thereof to each of them on the 31st day of March, 1908; and upon C. F. Johnston at Casey, Illinois by reading and delivering a true copy thereof to him on the 4th day of April, A. D. 1908.

The with- named defendants, Perry A. Little and Louis E. Willett not found in my district.

CHARLES P. HITCH,

United States Marshal.

By ARCH SPRING, *Deputy.*

Marshal's fees \$19.86.

Your petitioners further aver and show unto the Court that the bill of Complaint filed in this case is a Bill for Equitable relief to-wit, to cancel a certain lease upon and to remove a cloud from the title to certain land lying and being in the Eastern District of Illinois; that two of the defendants above named namely Perry A. Little and Louis E. Willett are non residents of the State of Illinois and of the Eastern District of Illinois, and were residents and citizens at the time of the filing of this suit and still are residents and citizens of the City of Buffalo in the State of New York. That said defendants have not voluntarily entered their appearance in this suit up to the present time.

Your petitioners therefore pray that this Court will enter
 34 an order directed to the above named defendants Perry A.

Little and Louis E. Willett commanding them to appear in this suit and to plead, answer or demur to the Bill of Complaint herein by a day certain to be fixed in said order.

And your petitioners, will ever pray, etc.

JOS. F. GUFFEY,

A. S. GUFFEY,

E. N. GILLESPIE,

ROBT. PITCAIRN,

GUFFEY, GILLESPIE & PITCAIRN,

Petitioners.

CHAS. GIBBS CARTER,

CHARLES TROUP,

Solicitors.

STATE OF ILLINOIS,
Vermilion County, ss:

Charles Troup, first being duly sworn on oath deposes and says that he has read the foregoing petition and knows the facts therein set forth and that they are true in substance and facts.

Dated this 5th day of June, 1908.

CHARLES TROUP.

Subscribed and sworn to before me, a notary public this 5th day of June, A. D. 1908.

[SEAL.]

MARY PERRIN,
Notary Public.

Be it further remembered that on the same day, to-wit: May 5th, 1908, there was entered by said Court, in said cause, an order of substituted service; that afterwards a certified copy of said order was returned and filed in the office of the clerk of said court, showing due service, and which said certified copy of said order together with the return of the Marshal thereon are in the words and figures following to-wit:—

35 *Order of May 5, 1908.*

In the Circuit Court of the United States for the Eastern District of Illinois.

JOSEPH F. GUFFEY, A. S. GUFFEY, E. N. GILLESPIE, ROBERT
PITCAIRN, JR., Copartners, Trading as Guffey, Gillespie & Pitcairn,
vs.

JAMES A. SMITH, H. E. WILCOX, J. W. SOLLEY, C. F. JOHNSTON,
Walter Hennig, The Ohio Oil Company, a Corporation; Perry A.
Little, and Louis E. Willett.

Order for Substituted Services.

On the 5th day of June A. D. 1908 in open Court at Danville Illinois, comes the complainants in the above named cause and present their application for substituted service, on the defendants to the above suit vis. Louis E. Willett and Perry A. Little, and it appearing to the Court that said suit is brought for the purpose of enforcing an equitable claim by complainant- and to remove a cloud upon the title to property situated within the Eastern District of Illinois, and that the aforesaid defendants are absent from the Eastern District of Illinois, and that they are not residents or inhabitants of said Eastern District of Illinois, or the State of Illinois, and cannot be found within the Eastern District of Illinois, or the State of Illinois and that they have not appeared to the said complainants' Bill of Complaint:

It is ordered by the court that said Perry A. Little and Louis E. Willett defendants to said Bill of Complaint shall appear, plead,

answer, or demur to Bill of complaint of said complainant by the 20th day of July, 1908, and that this order together with a copy of said Bill of Complaint be served upon said absent defendants at any time on or before the 20th day of June 1908 by the Marshal of Western District of New York, if found within said District, or by the Marshal of that district or any State or Territory of the United States wherever the said defendant- or any one or more of them may be found, if not found within the said Western District of New York.

36

Certificate of Clerk.

UNITED STATES OF AMERICA,
Eastern District of Illinois, ss:

I, Daniel Hogan, Clerk of the Circuit Court of the United States for the Eastern District of Illinois, do hereby certify that the above and foregoing is a true and correct copy of an order of court made and entered of record on the 5th day of June, A. D. 1908, in the case wherein Joseph F. Guffey, A. S. Guffey, E. N. Gillespie, Robert Pitcairn, Jr., copartners trading as Guffey, Gillespie & Pitcairn, are plaintiffs and James A. Smith, H. E. Wilcox, J. W. Solley, C. F. Johnson, Walter Hennig, The Ohio Oil Company, a corporation, Perry A. Little and Louis E. Willett are defendants.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said court, at Danville, in the District aforesaid, this 5th day of June, in the year of our Lord one thousand nine hundred and eight.

[SEAL.]

DANIEL HOGAN, *Clerk,*
By A. G. DAVIS, *Deputy.*

*Return on Service of Writ.**Marshal's Return.*

UNITED STATES OF AMERICA,
Western District of New York, ss:

I hereby certify and return that I served the annexed Order on the therein-named Perry A. Little and Louis E. Willett by handing to and leaving a true and correct copy thereof together with a copy of the bill of Complaint with each of them personally at Buffalo in said District on the 19th day of June, A. D. 1908.

WM. R. COMPTON,

U. S. Marshal,
By HOWARD CONKLING, *Deputy.*

37 Be it further remembered that on to-wit: January 19th, 1909, the following proceedings were had and entered of record in said cause, to-wit:

JOSEPH F. GUFFEY et al.

vs.

JAMES A. SMITH et al.

Chancery.

And now on this 19th day of January, A. D. 1909, come the parties to this cause, by their respective solicitors, into open court, and the defendants by their solicitors, file and present their demurrer to the complainants' bill of complaint. And this cause coming on now to be heard upon the said demurrer to the complainants' bill of complaint and the Court having heard the arguments of counsel for the defendants and complainants, respectively, and not now being fully advised in the premises takes said cause under advisement.

Order of Jan. 27, 1909.

Be it further remembered that on to-wit: January 27th, A. D. 1909, the following proceedings were had and entered of record in said cause, to-wit:

JOSEPH F. GUFFEY et al.

vs.

JAMES A. SMITH et al.

Chancery.

And now on this 27th day of January, A. D. 1909, come again the parties to this cause, by their respective solicitors, into open court, and this cause coming on for decision of the court upon the demurrer of the defendants to the complainants' bill of complaint, and the Court having heretofore heard the arguments of counsel for the respective parties and now being fully advised in the premises,

It is Ordered and Adjudged by the court that the said demurrer of the defendants to the complainants' bill of Complaint, be, and the same is hereby overruled.

And now on motion of solicitors for complainants, the defendants are by the Court, ruled to answer the complainants' bill of complaint herein within twenty (20) days from this date.

38

Filed Feb. 15, 1909.

Be it further remembered that on to-wit: February 15th, A. D. 1909, came the defendants, James A. Smith, J. W. Solley, C. F. Johnson and Walter Hennig, and filed in the office of the Clerk of said Court their joint and several answers to the bill of complaint herein, in the words and figures following to-wit:

In the Circuit Court of the United States for the Eastern District of Illinois.

JAMES A. SMITH, H. E. WILCOX, J. W. SOLLEY, C. F. JOHNSON, Walter Hennig, The Ohio Oil Company, a Corporation; Perry A. Little and Lewis E. Willett,
 ats.

JOSEPH F. GUFFEY, A. S. GUFFEY, E. N. GILLESPIE, and ROBERT Pitcairn, Jr., Co-partners, Trading as Guffey, Gillespie & Pitcairn.

In Chancery.

The Joint and Several Answer of James A. Smith, J. W. Solley, C. F. Johnson, and Walter Hennig, Defendants, to the Bill of Complaint of Joseph F. Guffey, A. S. Guffey, E. N. Gillespie, and Robert Pitcairn, Jr., Co-partners as Guffey, Gillespie & Pitcairn, Complainants.

These defendants—reserving to themselves all right of exception, for answer to said bill of complaint say,

They are not advised as to the residence and citizenship of the said Joseph F. Guffey, A. S. Guffey, E. N. Gillespie, and Robert Pitcairn, Jr., co-partners as Guffey, Gillespie & Pitcairn, and neither admit nor deny that they are citizens of the state of Pennsylvania, but ask for strict proof;

These defendants further answering, admit that James A. Smith, J. W. Solley, C. F. Johnson and Walter Hennig, were at the time citizens of the state of Illinois, and residents of the Eastern District thereof; That the Ohio Oil Company is a corporation organized and existing under the laws of the State of Ohio; that the defendants, Perry A. Little and Lewis F. Willett are citizens and residents of the state of New York; that the amount in controversy in this
 39 cause is of the value of Two Thousand Dollars, exclusive of interest and costs, that on and prior to the 22d day of May, A. D. 1905, the defendant James A. Smith was seized in fee of the following described real estate, situated in the county of Crawford and state of Illinois, to-wit:

The west half of the northeast quarter of the northeast quarter of section eleven (11) Township eight (8) north, range fourteen (14) west, containing twenty acres, but deny that on the 22d day of May, A. D. 1905, the said James A. Smith for a valuable consideration to him then and there paid by one M. A. Walton sold, and by a certain instrument in writing commonly called an oil and gas lease by him duly executed, sealed, acknowledged and delivered, conveyed and leased said premises to the said M. A. Walton for the purpose of developing and operating the same for oil and gas.

These defendants further answering, say that they do not know whether or not one R. L. Prosser was on the 13th day of November, A. D. 1905, and for a long time prior thereto, an employee in the service of the complainants as a lessor, and do not know whether

or not it was the duty of the said Prosser to procure loans from the owners of the fee, or purchase loans and household estates as the opportunity would offer, and they do not know whether or not the complainants directed the said Prosser to go to the state of West Virginia to procure the assignments of a loan from one M. A. Walton and they ask for strict proof of said several facts. They deny that the said Prosser purchased any loan from the said M. A. Walton on or about the 13th day of November, A. D. 1905, on the lands hereinbefore described, and they deny that the said Walton for a valuable consideration, by the complainants then paid to him, duly assigned, transferred and set over to the said Prosser in trust for the complainants, all of his (Walton's) right, title and interest in and to a loan and household estate on said premises, and deny that the said Prosser by any such assignment, became vested with the legal title and the complainants to an equitable title, in and to a loan and household on said above described lands.

Further answering, these defendants deny that said instrument set forth in the bill of complaint as a loan from said James A. Smith to M. A. Walton, bearing date the 23d day of May, 1906, on the land above described, is a loan for oil and gas purposes on said lands, and they deny that said instrument was executed for any consideration, and deny that pursuant to said instrument,

40 the said Walton became vested with any right, title or interest, either legal or equitable in or to the land in said instrument described, or to any part thereof, and state the truth to be that said instrument was executed without consideration whatever being paid by the said Walton to the said Smith; that said instrument is void for want of authority, that the said Walton, his successors and assigns did not, nor did anyone for them, go into possession of said lands or any part thereof, after the signing of said instrument or prior thereto, and deny that by any assignment thereof, the complainants or either of them became seized of any right, title or interest in or to said premises, or any part thereof, and state the truth to be that long prior to said pretended assignment to the said R. L. Prosser by the said M. A. Walton, the said Walton wholly abandoned all rights by virtue of said instrument and wholly failed to exercise any right whatever claimed under said instrument, and that at the time of the execution of said assignment by reason of his failure to accept said instrument, and by reason of the failure to develop said land for oil or gas, and by reason of failure to perform any conditions set forth in said instrument, had forfeited all right, title and interest in and to said pretended household.

These defendants further answering say, that one of the conditions contained in said instrument was as follows: "And further, upon the payment of one dollar, at any time by the part of the second party, heirs successors or assigns, shall have the right to rescind this lease for cancellation, after which all payments and liabilities thereafter to accrue under and by virtue of its terms, shall cease and determine, and this lease become absolutely null and void." By virtue of which said provision, said party of the second

part, his heirs, successors and assigns, held the right, at any time after the execution of said instrument, to cancel and forever determine all obligations on their part, pursuant to the terms and conditions of said lease, by reason whereof, said lease thereby became and was unilateral and void for want of mutuality.

These defendants further answering, stated that it is true that said instrument was filed for record on or about the 15th day of June, A. D. 1906, in the office of the recorder of deeds of the county of Crawford, and State of Illinois, and entered of record in lease record

41 No. 1, on page 450 of the records of said office. And these defendants say that prior to the filing of said lease for record, by the said complainants, and on the 23d day of March, A. D. 1906, the said James A. Smith duly executed and delivered to one H. E. Wilcox, an oil and gas lease on the real estate hereinbefore described, in and by which said lease so executed to the said Wilcox, the said Wilcox, his heirs, executors, successors and assigns, became vested with the right to enter upon said premises at all times for the purpose of drilling and operating for oil and gas, and to erect and maintain all buildings and structures and to lay all pipes necessary for the production of oil or gas, which said lease was filed for record on the 14th day of June, A. D. 1906, and duly entered of record in lease record No. 1 on page 417, of the records of the office of the recorder of deeds, in and for the county of Crawford and State of Illinois. By reason of which said recording of said lease so executed by the said James A. Smith to the said H. E. Wilcox, the said M. A. Walton his successors, heirs, administrators, and assigns and the said Joseph F. Guffey, A. S. Guffey, E. N. Gillespie, and Robert Pitcairn, Jr., as partners, trading as Guffey, Gillespie & Pitcairn, and each in their individual capacity then and there became duly notified that the said James A. Smith had pursuant to the terms and conditions of said pretended lease to the said Walton and pursuant to law, elected to determine all rights the said M. A. Walton, his heirs, administrators, successors or assigns might have or pretend to have under the terms of said pretended lease.

These defendants further answering, neither admit nor deny that the complainants were at the time of said pretended assignment of said instrument to the said Prosser by the said Walton, ready, willing and able to enter upon said premises and fully develop the same for oil and gas, and they deny that by reason of the collusion and confederation of the said James A. Smith, that the said complainants, nor the said assignors developed said premises, and deny that the complainants as the owners of a lease and leasehold estate did, on the 7th day of April, A. D. 1906, deposit to the credit of the said James A. Smith, in Exchange Bank at Martinsville, Illinois, the sum of five dollars in full payment of the rental due under said lease from the 22d day of February, 1906, to the 22d day of February, 1907, for delay in completing a well on said premises prior to the 22d day of February, A. D. 1907, and they deny that

42 said pretended lease contains any such provision.

Further answering these defendants deny that on or about the 7th day of May, A. D. 1907, the complainants deposited to the

credit of said James A. Smith in said Exchange Bank, of Martinsville, Illinois, the further sum of \$2.50 in full payment of the rental due under said lease from the 22d day of February, 1907, to the 22d day of August, 1907, for delay in completing a well on said premises prior to the 22d day of August, A. D. 1907, and deny that on the 31st day of July, 1907, the complainants deposited to the credit of the said James A. Smith, in said Exchange Bank, the further sum of \$1.25 in full payment of the rental due under said pretended lease from the 22d day of August, 1907, to the 22d day of November, 1907, for delay in completing a well on said premises prior to the 22d day of November, 1907; and deny that on the 7th day of November, 1907, the complainants deposited to the credit of the said James A. Smith, in said Exchange Bank, the further sum of \$1.25, in full payment of the rental due from the 22d day of November, A. D. 1907 to the 22d day of February, A. D. 1908, and deny that on the 15th day of February, A. D. 1908, the complainants deposited to the credit of the said James A. Smith, in said Exchange Bank, the further sum of \$1.25 in full payment of the rental due under said lease from the 22d day of February 1908, to the 22d day of May, 1908, and these defendants deny that said sums were deposited, and deny that they were and are in full payment and discharge of the various amounts due for delay in completing a well on said premises from the 22d day of February, 1906 to the 22d day of May, 1908.

These defendants further answering, admit that on or about the 23d day of March, 1906, the said James A. Smith, executed and delivered to the said Wilcox an oil and gas lease in and by which said oil and gas lease the said Smith leased the west half of the northeast quarter of the northeast quarter of Section eleven (11), Town. eight (8) north, Range fourteen (14) west, in the county of Crawford and State of Illinois, being the same land described in said pretended lease to the said M. A. Walton hereinbefore mentioned, pursuant to the terms and conditions of which said lease, the said H. E. Wilcox became and was vested with the right to enter upon said lands for the purpose of drilling and operating for oil and gas, and to maintain all buildings and structures and to lay pipe lines
43 for the production and transportation of oil and gas; and these defendants deny that the said James A. Smith and the said H. E. Wilcox combined, colluded and confederated to cheat, defraud and wrong the complainants; and deny that the said Wilcox or the said Smith knew of any right or pretended right of the complainants, and state the truth to be that the complainants, and their assignors had, long prior to said date, wholly failed to attempt to develop said lands or any part thereof, for oil and gas, and have wholly abandoned said premises and all rights under and by virtue of the terms of said pretended lease, and had at said time, although many months had intervened, wholly failed to place said instrument or any assignment thereof, on record, and these defendants say that said lease from the said Smith to the said Wilcox was made in good faith, without intent to cheat or defraud the complainants or either of them or their assignors, and that pursuant to the terms

thereof, the said Wilcox went into possession of said lands by and with the consent of the said Smith and in good faith, and then and there proceeded pursuant to the terms and conditions of said lease to drill a well on said lands for oil and gas, which said well, when completed, produced neither oil nor gas. And after said well had been so drilled and so produced neither oil nor gas, the said H. E. Wilcox surrendered said lease and all rights under and by virtue of the terms and conditions thereof, to the said James A. Smith, and since said time has claimed no right, title or interest and now disclaims all right, title and interest in and to said leasehold estate, and all interest in said premises, pursuant to the terms and conditions of said lease.

These defendants further answering, would show unto your honor that at the time of the execution of said instrument to the said M. A. Walton, and at the time of the assignment of the said interest in said instrument from the said M. A. Walton, to the said R. L. Prosser, said lands above described were located in territory which had been developed for neither oil nor gas, and was in what is commonly called among men engaged in that production of oil and gas, "wild cat" territory, and that said instrument from the said James Smith to the said M. A. Walton, was an option whereby the said M. A. Walton, his successors and assigns, had the right, pursuant to the terms and conditions of said option, to, during the life of said option, upon the acceptance of said option

44 before the revocation thereof and by the exercise of the rights conferred pursuant to the terms and conditions of said option, to enter upon said lands and develop the same according to the terms and conditions of said option, and thereby become vested with the rights granted, pursuant to the terms and conditions of said option, and these defendants state that the said Walton was a speculator in leases and options for oil and gas purposes, and that the said Joseph F. Guffey, A. S. Guffey, E. N. Gillespie and Robert Pitcairn, Jr., co-partners, trading as Guffey, Gillespie and Pitcairn, and the said R. L. Prosser were each speculators in oil and gas leases, and options and that said option was held by the said several parties without any intent to develop said property according to the terms and conditions of said option, and was held by said several parties to await the development of other lands in the immediate locality of said above described lands, and was held by them severally for speculative purposes, with the intent if the said lands located in said locality of the lands above described should be developed for oil and gas, and should prove to be valuable land for said purposes, that they might by the exercise of their said option on said land, speculate on said option on said lands, and by reason thereof, these defendants charge the fact to be that the said complainants nor either of them, nor their assignors, ever in good faith held said lands for any purposes save for said purpose of speculating thereon.

These defendants admit that on the 23rd day of March, A. D. 1906, the said James A. Smith, executed another lease on the same lands hereinbefore described for oil and gas purposes, that

said lease was filed for record and recorded in the Recorder's office of the County of Crawford and State of Illinois, in lease record 5, on page 182, but deny that said lease was made for the purpose of cheating and defrauding the complainants or either of them or their assignors, but state that said lease was held, and that the same was surrendered by Wilcox at the same time said other lease was surrendered by him to the said James A. Smith.

These defendants further answering, admit that on or about the 9th day of August A. D. 1906, the said James A. Smith, executed and delivered to this defendant, C. E. Allison a certain instrument in writing, the same then and there being an oil and gas lease granting to the said C. E. Allison, the right to develop and
45 produce oil and gas from the premises hereinbefore described, which said lease was on the 28th day of January, 1907, filed for record and duly entered of record in Book 6 on page 474 of the lease records in the offices of the recorder of deeds of said county of Crawford, and admit that the copy of said lease set forth in the bill of complaint filed herein, is correct. And these defendants deny that the said James A. Smith and the said C. E. Allison colluded and confederated to injure and defraud the complainants and state the truth to be that said lease from the said James A. Smith to the said C. E. Allison was made in good faith by the said James A. Smith, and accepted in good faith by the said C. E. Allison; that said lease was made for a valuable consideration paid by the said C. E. Allison to the said James A. Smith, and was made after said pretended lease to the said M. A. Walton had been abandoned by the said M. A. Walton and his assignees, and after said lease to the said H. E. Wilcox had been surrendered and after the complainants and their assignors had been notified that the said James A. Smith had elected to determine said option so held by the complainants, and that in pursuance of said lease, and in carrying out the terms and conditions thereof, the said C. E. Allison, within a short time after the execution thereof, entered upon said premises, and drilled a well thereon for oil and gas, which said well when completed, produced gas in paying quantities. The gas from which said well thereafter being used in and about the developing said lands hereinbefore described and other adjoining lands, for which said gas, the said James A. Smith has received the full compensation agreed upon, pursuant to the terms and conditions of said lease.

These defendants further answering, admit that on or about the 1st day of September, A. D. 1906, the said C. E. Allison, by his written assignment, set over and assigned to Lewis E. Willett all his interest in said lease, and admit that said assignment was recorded in Lease record 6 on page 475, of the Lease Records of the County of Crawford and State of Illinois, and that the same, as set forth in said bill of complaint, is correct. They deny that said written assignment was merely an attempt to assign an interest in said lease, and state the truth to be that by reason of the execution of said instrument, or lease, on the 9th day of August,

1906, by the said James A. Smith, to the said C. E. Allison,
46 and by reason of the payment of said consideration by the said Allison to the said Smith and by reason of the development of said lands for gas, as above set forth, by the said Allison and said Allison became seized of a leasehold estate in said lands hereinbefore described, according to the terms and conditions of said lease, and that he became vested with all rights granted by said lease, and that said transfer was made by the said Allison and accepted by the said Willett in good faith, for a valuable consideration and that thereby the said Willett became seized of all the interests of the said Allison in and to said leasehold estate. And that afterwards, on the 25th day of March, A. D. 1907, the said Willett sold, assigned and transferred all his interest in and to the said Allison lease to J. W. Solley, and C. F. Johnson, which said assignment was duly entered of record in book 8 on page 437 of the Miscellaneous records in the office of the Recorder of Deeds of said County of Crawford, and they deny that said assignment was made with a design to cheat and defraud complainants, or either of them, and deny that at the time of assignment, the said complainants or either of them, had any interest in or to said lands hereinbefore described, or any leasehold estate thereon, and say that said assignment was made by the said Willett in good faith, and accepted by the said Solley, and Johnson in good faith and for a valuable consideration paid by the said Solley and Johnson to the said Willett, and that by the said assignment, the said Solley and Johnson seized of all right, title and interest granted by the said James Smith to the C. E. Allison, his heirs, successors and assigns in and by said lease.

These defendants further answering deny, that at the time of the taking of said lease from the said James A. Smith, to the said C. E. Allison, bearing date the 9th day of August, 1906, and at the time of the making of the several assignments thereof, said lease was taken and said several assignments made, with full knowledge of any claim of the complainants, and in fraud of the rights of the complainants therein, and state the truth to be that said lease was made and accepted by the parties thereto and said several assignments were made and accepted by the several parties thereto in good faith for valuable consideration, and that at the time of the execution of said several instruments and deny that said complainants or their assignors had any right, title or interest either at law or in equity, in and to the premises herein-

47 before described or any part thereof. And these defendants deny that said lease and the several assignments thereof, and each of them, are clouds on any title to said premises owned by the complainants; and they deny that a court of equity has power to remove said several instruments as clouds on the pretended title or interest of the said complainants, but state the truth to be that the said James A. Smith at the time of the execution of said lease to the said Allison was the owner of said premises in fee simple, and as such owner was in the sole and exclusive possession thereof, and that upon the execution of said lease to

the said Allison the said Allison pursuant to the terms and conditions of said lease, took possession of said premises for the purpose set forth in said lease and that thereafter the said Smith and Allison were jointly in possession of said premises until the assignment of said interest by the said Allison and after each successive assignment, the assignee of said interest immediately upon the assignment of such interest in said lease, went into possession of said premises, together with the said Smith, and that at no time have the said complainants or their assignors, or either of them, been in possession of said premises, or any part thereof.

These defendants further answering, admit that on or about the 28th day of March, A. D. 1907, J. W. Solley and C. F. Johnston became and were indebted to Perry A. Little and Lewis E. Willett in the sum of Twenty Thousand Dollars, as part of the purchase price of various oil and gas leases and leasehold estates purchased by the said Solley and Johnson from the said Little and Willett, among which said leasehold estates so included in said mortgage, being said leasehold so executed by the said James A. Smith, to the said C. E. Allison, hereinbefore set forth, and that said Mortgage was given to secure five promissory notes, each for the sum of four thousand dollars; which said Mortgage was recorded on page 210 of Mortgage Record 64, of the Mortgage Records of the County of Crawford and State of Illinois; They deny that said mortgage became a cloud upon the title of the complainants in or to any interest in said lands, and they admit that said mortgage has been fully paid off, and fully discharged, and state the truth to be that said mortgage has been released of record before the bringing of this suit.

48 These defendants further answering, admit that it is true that the defendants, Solley and Johnston have conveyed an undivided one-fourth ($\frac{1}{4}$) interest in said lease from the said James A. Smith to C. E. Allison, to Walter Hennig, and that the said Walter Hennig now claims a one-fourth interest in said lease, and these defendants deny that said claim of said interest by the said Hennig is in fraud of the right of the complainants, and deny that the said complainants have any right, and deny that the claim of the said Walter Hennig is a cloud on any right title or interest of the complainants.

These defendants further answering, deny that said option given by the said James A. Smith to the said M. A. Walton on the 22nd day of May, A. D. 1905, and afterwards by mesne assignments attempted to be transferred to and now claimed by the complainants, is a good, valid and subsisting lease, in full force and effect, and state the truth to be that each and every of the other leases so given by the said James A. Smith as set forth in said bill of complaint, and the several assignments thereof, and the said mortgage, were, each of them, from the date of their respective delivery thereof, valid, subsisting instruments, and each convey a valid, subsisting interest in and to said premises.

These defendants further answering, deny that after the defendants Solley and Johnston obtained their assignment as above set

forth, and prior to their entrance on said premises on, to-wit: the 1st day of April, 1907, were served by the complainants with a written notice of any pretended claim of any interest by the complainants in and under said pretended lease to the said Walton, and deny that said notice commanded the said J. W. Solley and C. F. Johnson, their agents, attorneys, employees, helpers, servants, representatives and assigns, or any or either of them to refrain from entering upon said premises, or any part thereof, or that they were notified that if they did so, it would be at their peril, and deny that the complainants made any claim or asserted any right in or to said premises, or said leasehold estate at said time. And these defendants deny that they secretly and fraudulently entered said premises without the knowledge or consent of the complainants or either of them, and developed several oil and gas wells, and have produced and sold large quantities of oil and gas in and under said premises, and converted large sums of money derived therefrom to the great

49 loss and damage of the complainants, but state the truth to be that pursuant to said several assignments of said lease from the said James Smith to the said C. E. Allison, these defendants, immediately upon becoming the owners of said leasehold estate, entered upon the development of said land for oil and gas, and that in and about carrying out the terms and conditions of said lease, they have drilled and are now operating five producing oil wells on said lands: that said first oil well was completed on or prior to the 8th day of August, A. D. 1907, and the fifth of said wells was completed prior to the 3d day of September, A. D. 1908, and that in and about drilling said wells these defendants paid, laid out and expended the sum of ten thousand dollars. And these defendants admit that it is their intention to drill such other wells as may become necessary in and about developing said lands.

These defendants admit that they have sold and delivered to The Ohio Oil Company, large quantities of oil produced and saved from said premises, and they admit that there is a large amount of money due from the said The Ohio Oil Company that has not been paid over to these defendants or anyone for them or to any person legally entitled thereto, and that the said The Ohio Oil Company is still holding the amount due thereon, and these defendants state that said money by reason of the facts hereinbefore set forth, is due to these defendants, and these defendants admit that the said complainant on their own motion notified the Ohio Oil Company that they claimed to own the above mentioned oil, and that they would demand payment therefor, and that if said The Ohio Oil Company paid said money to these defendants, the said complainants would bring suit to recover the value thereof, and these defendants deny that the said complainants, or either of them, have any right, title or interest in said money, and that the interference by the said complainants with the payment of said moneys by the said The Ohio Oil Company to these defendants, was without warrant or authority at law, and was made for the purpose of harassing these defendants, and for the purpose of procuring a settlement of some pretended claim of the said complainants.

These defendants further answering, state that they do not know the exact amount that is now due them from The Ohio Oil Company for oil delivered to said The Ohio Oil Company, and produced
50 from said lands hereinbefore mentioned.

These defendants further answering, state that at the time of the bringing of this suit by the said complainants, the said lands hereinbefore described were lands that had been in cultivation up to the time of drilling said oil wells thereon, and that prior to the drilling of said oil wells, said lands had at all times been in the possession of the said James A. Smith during his ownership thereof, and that at the time of the bringing of this suit, said lands were in possession of these defendants, James A. Smith, J. W. Solley, C. F. Johnson, and Walter Hennig, and that at no time have the complainants or either of them, ever been in possession of said land, or any part thereof.

And these defendants further answering, deny that the complainants are entitled to the relief or any part thereof, in the said bill of complaint demanded, and pray the same advantage of this answer as if they had pleaded or demurred to the said bill of complaint, and pray to be dismissed with their reasonable costs and charges in this behalf most wrongfully sustained.

JAMES A. SMITH,
J. W. SOLLEY,
C. F. JOHNSTON,
WALTER HENNIG,
By PARKER & EAGLETON,
Solicitors for said Defendants.

JAY A. HINDMAN,
GEORGE W. JONES AND
PARKER & EAGLETON.

Solicitors.

Be it further remembered that on to-wit: February 17th, 1909, came the defendants, Perry A. Little and Lewis E. Willett, by their solicitors, and filed in the office of the Clerk of said court their answer to the bill of complaint herein in the words and figures, following, to-wit:

51

Filed Feb. 17, 1909.

In the Circuit Court of the United States for the Eastern District
of Illinois.

No. 331.

JOSEPH F. GUFFEY, A. S. GUFFEY, E. N. GILLESPIE, ROBERT PIT-
CAIRN, JR., Copartners Trading as Guffey, Gillespie & Pitcairn,
VS.

JAMES A. SMITH, H. E. WILCOX, J. W. SOLLEY, C. F. JOHNSTON,
Walter Hennig, The Ohio Oil Company, a Corporation; Perry A.
Little, Louis E. Willett.

*The Disclaimer of Two of the Defendants Perry A. Little and Louis
E. Willett to the Bill of Complaint.*

The defendants, Perry A. Little and Louis E. Willett saving and reserving to themselves now and at all times hereafter all manner of advantage and benefit of exceptions and otherwise that can or may be had and taken to the many untruths, uncertainties and imperfections in the said complainants' bill of complaint contained, for answer thereto or unto so much or such part thereof as is material for these defendants, Perry A. Little and Louis E. Willett to make answer unto, they answer and say that they fully and absolutely disclaim all manner of right, title and interest whatsoever in and to the lease and leasehold premises and real estate in said bill of complaint mentioned and described, because they say that long before the filing of said bill of complaint they sold, assigned, transferred and conveyed to the defendants J. W. Solley and C. F. Johnston all the right, title and property that they ever at any time had, possessed or owned therein, and in any and every part or parcel thereof, and that the said mortgage so executed and delivered to the defendants Perry A. Little and Louise E. Willett on or about the 28th day of March, 1907, by the said J. W. Solley and C. F. Johnson mentioned in the bill of complaint for the sum of Twenty Thousand Dollars as a part of the purchase price of various oil and gas leases and leasehold estates to secure the payment of five certain promissory notes each for the sum of Four Thousand Dollars payable in one, two, three, four and five months after date respectively, with six per cent per annum interest from date, were each and all with the interest thereon duly paid, settled and discharged by the said J. W. Solley and C. F. Johnson to these defendants Perry A. Little and Louis E. Willett long before the filing of this bill of complaint, and that said notes and each of said notes and said mortgage were duly delivered to the said J. W. Solley and C. F. Johnson with a written release therefor duly signed and acknowledged by the said defendants Perry A. Little and Louis E. Willett long before the filing of this bill of complaint.

The said defendants Perry A. Little and Louis E. Willett further

and expressly deny all and all manner of unlawful combination and confederacy unjustly charged against them in and by the said bill of complaint, and aver and are ready to prove that all transactions and agreements by them entered into in connection with said lease and leasehold estate and the real estate therein described were in the best of faith and at all times for a valuable consideration, without this that any other matter or thing in said bill contained material or necessary for these defendants to make answer unto and not herein well and sufficiently answered unto, confessed *was void*, traversed or denied is true; all of which matters and things these defendants are ready to aver, maintain and prove as this Honorable Court shall direct, and humbly pray to be hence dismissed, with their reasonable costs and charges in this behalf most wrongfully sustained.

LINDLEY, PENWELL & LINDLEY AND
SIMMONS & DAILEY,

*Attorneys for Defendants Perry A.
Little and Louis E. Willett.*

53

Replication. Filed Apr. 3, 1909.

In the Circuit Court of the United States for the Eastern District
of Illinois.

No. 331.

JOSEPH F. GUFFEY, A. S. GUFFEY, E. N. GILLESPIE and ROBERT
Pitcairn, Jr., Copartners, Trading as Guffey, Gillespie & Pit-
cairn,

VS.

JAMES A. SMITH et al.

Replication of Joseph F. Guffey, A. S. Guffey, E. N. Gillespie, and
Robert Pitcairn, Jr., Copartners, Trading as Guffey, Gillespie &
Pitcairn, Complainants, to the Answer of — Smith, J. W.
Solley, C. F. Johnson, and Walter Hennig, Defendants.

These repliants, saving and reserving unto themselves any and all
manner of advantage of exception to the manifold insufficiencies
of the said answer, for replication thereunto say; That they will
aver and prove their said bill to be true, certain and sufficient in
the law to be answered unto; and that the said answer of the defend-
ants is unec.tain, untrue and instufficient to be replied unto by these
repliants; without this, that any other matter or thing whatsoever
in the said answer contained, material or effectual in law to be
replied unto, confessed and avoided, traversed or denied; is true;
all of which matters and things these repliants are, and will be,
ready to aver and prove as this honorable court will direct and
humbly pray as in and by their said bill they have already prayed.

CHAS. GIBBS CARTER,
CALLAHAN, JONES & LOWE,
CHARLES TROUP,

Solicitors for Complainants,

And be it further remembered that on to-wit: April 3d, 1909, came the complainants by their solicitors, and filed in the office of the clerk of said court their replication to the answer of the defendants, in the words and figures following, to-wit:

54

Order of Apr. 5, 1909.

Be it remembered that on to-wit: April 5th, A. D. 1909, the following further proceedings were had and entered of record in said cause, to-wit:

Chancery.

JOSEPH F. GUFFEY et al.

VS.

JAMES A. SMITH et al.

And now on this 5th day of April, A. D. 1909, come the complainants, by their solicitor, Charles Troup, and enter their motion for the Court to refer this cause to the Master-in-Chancery of this court to take testimony. And it now appearing to the Court that issue has been duly joined herein,

It is Ordered and Adjudged, by the Court, that said cause be and it is hereby referred to Hon. Walter T. Gunn, Master-in-Chancery of this court, to take the testimony herein, and that he report the same to this court, together with his conclusions of law and fact.

And afterwards, on to-wit: September 13th, 1909, came the defendant, The Ohio Oil Company, by its solicitor, and filed in the office of the clerk of said court its separate answer to the bill of complaint herein, in the words and figures following, to-wit:

Separate Answer. Filed Sept. 13, 1909.

In the Circuit Court of the United States for the Eastern District of Illinois.

No. —. In Chancery.

JOSEPH F. GUFFEY, A. S. GUFFEY, E. N. GILLESPIE, ROB'T PITCAIRN, Jr., Copartners, Trading as Guffey, Gillespie and Pitcairn,

VS.

JAMES A. SMITH, H. E. WILCOX, J. W. SOLLEY, C. F. JOHNSON, Walter HHennig, The Ohio Oil Company, a Corporation; Perry A. Little, and Louis E. Willett.

The Separate Answer of The Ohio Oil Company, One of the Defendants, to the Bill of Complaint of Joseph F. Guffey et al.

55

This defendant now, and at all times hereafter saving and reserving unto itself all benefit and advantage of exception

which can or may be had or taken to the many errors, uncertainties and other imperfections in the said bill contained for answer thereto, or to so much and such parts thereof as this defendant is advised is, or are material or necessary for it to make answer unto, answering says:

That it has no interest in the matters and facts set forth and alleged in the amended bill filed by complainants herein, and that it is not in fact advised as to the matters in controversy between complainants and the defendants, other than this answering defendant, as in said bill charged, for all of which reasons this answering defendant denies said amended bill, and each and every statement and averment alleged therein.

Further answering this defendant says that it is purchasing oil which is being produced from the premises described in complainants' bill by J. W. Solley, C. F. Johnson and Walter Hennig, defendants herein, under an agreement entered into with them by this answering defendant, and is paying for said oil so purchased from time to time at the option of said defendants, but not to exceed a period of two months from time said oil is run.

And this defendant further answering, denies that the complainant is entitled to the relief, or any part thereof, in the said bill of complaint demanded, and prays the same advantage of this answer as if it had pleaded or demurred to the said bill of complaint; and prays to be dismissed with its reasonable costs and charges in this behalf most wrongfully sustained.

THE OHIO OIL CO.,

By F. C. DONNELL,

Vice-President.

T. E. HURLEY, *Secretary.*

And afterwards, on to-wit: September 13th, A. D. 1909, the following proceedings were had and entered of record in said cause, to-wit:

56

Chancery.

JOSEPH F. GUFFEY

vs.

JAMES A. SMITH et al.

Now on this 13th day of September, A. D. 1909, on motion of Charles Troup, attorney for complainants herein, it is ordered and adjudged, by the Court, that the order of this Court made and entered in this cause on the 5th day of April, A. D. 1909, referring said cause to the Master-in-Chancery to take evidence and to report his conclusions of law and fact be, and the same is hereby set aside. And now on motion of defendant, The Ohio Oil Company, it is by the court, given leave to file its answer to the complainants' bill herein.

And it now appearing that the defendant, H. E. Wilcox, has filed neither answer, plea or demurrer to the complainants' bill of com-

plaint herein, although such plea, answer or demurrer should have been heretofore filed, and it now appearing to the court that said defendant, H. E. Wilcox, has been duly and properly served with process according to law and on motion of Charles Troup, attorney for complainants,

It is ordered and adjudged, by the court that said bill of complaint be taken pro confesso, as to the said defendant, H. E. Wilcox.

Order of Sept. 13, 1909.

And now on the same day, on motion of complainants' said attorney, it is ordered and adjudged by the court that this cause be, and the same is hereby referred to Walter T. Gunn, Esq., Master-in-Chancery of this court to take the evidence herein, and that he report the same to this court, together with his conclusions of law and fact thereon.

Be it further remembered that afterwards, on to-wit: December 24th, A. D. 1909, came Walter T. Gunn, Esq., Master-in-Chancery of this court, and filed in the office of the Clerk of said Court his report of testimony taken herein, together with his conclusions of law and fact thereon, which said report of testimony and report of conclusions of law and fact are in the words and figures following to-wit:

57 In the Circuit Court of the United States for the Eastern District of Illinois.

No. 222. In Chancery.

JAMES A. GIBSON, A. S. GIBSON, E. N. GIBSON, GEORGE FINCHAM, JR., CAPTAINS, TRADING as GIBSON, GILLIGAN & FINCHAM,

vs.

LEWIS A. SARGE, H. E. WILSON, J. W. SARGE, C. F. JENNISON, WALTER HENNING, THE OHIO OIL COMPANY, a Corporation, FERRY A. LITTLE, and LOUIS E. WILSON.

No. 223. In Chancery.

JAMES A. GIBSON, A. S. GIBSON, E. N. GIBSON, GEORGE FINCHAM, JR., CAPTAINS, TRADING as GIBSON, GILLIGAN & FINCHAM,

vs.

GEORGE SARGE, H. E. WILSON, J. W. SARGE, C. F. JENNISON, WALTER HENNING, THE OHIO OIL COMPANY, a Corporation, FERRY A. LITTLE, and LOUIS E. WILSON.

Testimony Taken and Proceedings Held Before the Honorable Walter T. Gann, Master in Chancery of said Court, Pursuant to an Order of Reference Writhesten and of the United States District Court Eastern, Danville, Illinois, on Thursday, June 25, 1890.

Appointments:

ADDNEY LEWIS, Esq., CHARLES TERRY, Esq., ROBERT J. SMITH, Esq., and ADDNEY YOUNG, Esq., Solicitors for Complainers;

J. T. WINDHAM, Esq., VALMORE FURBER, Esq., and ALMON CANNON, Solicitors for Defendants.

Now, on this 25th day of June, 1891, it is stipulated and agreed by and between counsel for complainants and defendants that the above entitled cases shall be tried together.

Whereupon the complainants to maintain the issues on said writ introduced the following evidence:

58 *Testimony of H. E. Wilson.*

MR. H. A. WATSON, a witness called on behalf of the complainants, being first duly sworn, was examined as directed by Mr. Terry, and testified as follows:

Q. Give your name, age, occupation and place of residence.

A. H. A. Watson, Gardner, West Virginia. 37 years of age, and have been having land for the last 17 years and have been operating

Q. Are you familiar or do you know the lands in controversy in this litigation?

A. Yes, sir.

Q. You may state, if you know, who took the leases, if any were taken?

A. I took the leases.

Q. Can you give the date?

A. It was in—I think it was four years ago last May; something like that; I could not give just exactly the date.

It is stipulated and agreed between the respective counsels for complainants and defendants that the land described in the two leases signed by Susannah Smith, one to M. A. Walton and the other to C. E. Allison, was intended to be the Northwest quarter of the Northeast quarter of Section II in Township eight north, Range fourteen east, in the County of Crawford, and State of Illinois, excepting ten acres off the west side thereof.

Q. Were you present at the time the leases were signed by Susannah Smith and James A. Smith, to you?

A. Yes, sir.

Q. You may state what transpired there at the time those leases were executed, Mr. Walton.

Mr. HINDMAN: I desire to renew our objection for the reason that the lease was reduced to writing, and the writing merged all verbal negotiations, and is the best evidence as to what the contract was.

The MASTER: He may answer.

Exception by defendants.

Q. You may state what it was,

A. You mean what transpired with Mrs. Smith?

Q. Yes, and James, too. They were both there together, all there together?

A. Yes, sir. We were all there together. Mr. Smith, Jimmie, was out in the field when I first went there. And he told me that he had a piece of land that he would lease and she went out
59 in the yard and hollered for him and he come in; and this man named Pierce was along with me; and he signed a lease and she signed one and were perfectly satisfied, both of them. And Mrs. Smith—well first, what interest she had in the life estate and her own fee—

Q. Well, now, we don't care for that, because that has all been agreed on. Now, what was said there about other matters; go on and state what was said.

A. Well when I told her that the rental—Benedum—Trees and those folks had been leasing for ten cents, and I would give her twenty-five cents per acre a year; and she seemed to be perfectly satisfied and she signed the lease; and we stayed there quite a little while—

Q. Well, now, was James A. Smith present at that conversation?

A. Yes, sir.

Q. And did you have the same——

Mr. HINDMAN: In order to avoid the necessity of repeating the objection and encumbering the record, we desire the objections to go to all of the conversations and verbal negotiations leading up to the execution of the instrument, for the reason that the instrument itself speaks as to what the agreement was.

Mr. LOWE: We expect to show in this entire matter that Mrs. Smith knew about it before and after and she knew directly that the terms of the lease was twenty-five cents an acre, both by what was said before it was signed and after it was signed.

Mr. HINDMAN: That is not material.

The MASTER: Well I will hear the evidence and you can argue that when it is all in.

Exception by defendants.

Q. Now, was James A. Smith present.

A. Yes, sir.

Q. Well now, what was said to him about acreage and rental, and how paid?

A. Well the same thing was said to him that was said to Mrs. Smith—would be 25 cents per acre per year.

Q. For what purpose did you take this lease or these two leases?

Mr. HINDMAN: We object to it. The leases speak for themselves.

Mr. LOWE: Well they allege in their answer that he was a scalper and a speculator.

60 The MASTER: And you allege that he took it in trust?

Mr. LOWE: No, sir; we allege he took the lease and they are claiming that this man did not take it with a view of operating the premises but that he just took it for speculative purposes. And we may not have him here all the time in rebuttal and it may be that it will not be competent but this man lives in West Virginia——

Mr. HINDMAN: I expect it would save more time to let him state. In the interest of time, I will let him state.

The MASTER: All right; go ahead.

Mr. HINDMAN: I want my general objection noted to all conversations leading up to the execution of the instrument as incompetent and improper for the reason that the contract was reduced to writing and it speaks for itself.

The MASTER: Well, he may answer that.

Exception by defendants.

Q. For what purpose did you take it?

A. Why, I took the lease to operate it, have it operated, operate it myself.

Q. Have you ever operated oil and gas leases in territory before that time?

A. Yes, sir; I have been interested in quite a number.

Q. What did you do with that lease given by Susannah Smith and the one given by James A. Smith to you?

A. What did I do with them?

Q. Yes, sir. Do you still own it.

A. No, I don't own it.

Q. What did you do with them?

A. I sold them to Mr. Gillespie.

Q. Who transacted the business between you and for Mr. Gillespie?

A. Mr. Prosser.

Q. Do you know his first name.

A. R. L.

Q. I will now offer you Exhibit 2 and ask you whose name that is signed there to Exhibit 2 (handing paper to witness)?

A. M. A. Walton.

Q. Who signed that?

A. I did, sir.

Q. I now hand you Exhibit 5, and ask you whose name is signed to that (handing paper to witness)?

A. M. A. Walton.

Q. Who signed it?

A. I did, sir.

61 Q. I now hand you Exhibit 1 and ask you what that is (handing paper to witness)?

A. That is the lease.

Q. From whom and to whom?

A. From Mrs. Sussanah Smith to M. A. Walton.

Q. And what is Exhibit 4?

A. Lease from James A. Smith to M. A. Walton.

Q. Are these the two leases you took from Susannah Smith and James A. Smith at the time about which you have testified?

A. Yes, sir.

Q. Did you get paid for these leases when you sold them.

A. Yes, sir.

Q. What did you get.

A. Ten cents an acre.

Q. How many acres did you sell?

A. I think it was 111 acres, or 110, something like that.

Q. By what were you paid, I mean, by what means did you get your money?

A. I got Mr. Gillespie's check.

Q. By Mr. Gillespie do you mean E. N. Gillespie?

A. Yes, sir.

Q. Who delivered to you that check?

A. Mr. Prosser.

Q. For whom was R. L. Prosser acting at the time he delivered it to you?

A. Why, Mr. Gillespie.

Mr. HINDMAN: Well, we object.

Mr. LOWE: In order that you may understand it, Mr. Prosser is and was the agent of Gillespie and was acting for him all the time and he went to purchase it and took Gillespie's check and paid for it, and paid it for Gillespie, but took the assignment right to himself;

but we allege in our bill that he was acting as the agent, and that assignment from Walton to Prosser gave the equitable title to Gillespie and then afterward he gave him the legal title.

The MASTER: I understand, but are you trying to prove the agency by his statement?

Mr. LOWE: I was just wanting to show what Prosser said about it, because Prosser might otherwise claim to own the property, I want to show what he said.

Mr. HINDMAN: You can't prove agency by the declaration of the agent.

62 The MASTER: Yes, that is the general rule that you cannot prove agency by the declaration of the agent, but now you are trying to show it as a declaration against his interest?

Mr. LOWE: Yes, that is what it would be if he claimed an interest. He doesn't claim, however, So it is to show just simply that Mr. Prosser was acting for Gillespie and not for himself.

The MASTER: Well, it wouldn't be proper to show agency by the admission of the agent but if you simply want to show his lack of interest by a declaration against his interest——

Mr. LOWE: Yes, sir.

The MASTER: Why, it can go in for that purpose, but no other.

Mr. LOWE: That is all I want it for, I do not want to create agency by this witness.

The MASTER: Is Mr. Prosser a party to this suit?

Mr. HINDMAN: No, sir; there is no issue upon which this testimony could be admitted on that theory.

The MASTER: Well, I don't believe that would be competent evidence, Mr. Lowe.

Mr. LOWE: Very well, we withdraw the question.

Q. You say you were paid by whose check?

A. Mr. Gillespie's, E. N.

Q. Do you remember the amount of the check,—how much it was for?

A. Eleven dollars and something, I think it was for.

Q. What did you do with the two leases after you got your money?

A. I turned them over to Mr. Prosser.

Mr. LOWE: You may ask him.

Cross-examination by Mr. HINDMAN:

Q. What is your business?

A. Well, I have been leasing land and paying royalties for the last fifteen—ten years, you might say.

Q. Leasing—taking leases?

A. And operating, and operating.

Q. Where did you begin the leasing business?

A. Where did I begin leasing?

Q. Yes.

A. Why, in West Virginia.

Q. Took leases for yourself in West Virginia?

- A. Yes sir.
- 63 Q. How many leases did you take in West Virvinia?
- A. Oh, I couldn't tell you just how many; took quite a number of them.
- Q. In what counties?
- A. In Marshall County and Wetzel County, and Tyler County.
- Q. Always took the leases in your own name?
- A. I did when I didn't—I took them in my own name; for instance, maybe there would be four or five of us go together, and then from ourselves as a company kind of. It is not a chartered company, though.
- Q. You didn't go out and take leases in your name while in fact they were for somebody else?
- A. No, sir; I never did.
- Q. Then the leases that were taken in your name were your leases?
- A. Yes, sir; they were.
- Q. And you took leases in your own name in West Virginia?
- A. Yes, sir.
- Q. In some three or four different counties?
- A. Yes, sir.
- Q. More than that, weren't there?
- A. No, not—Let's see. In Wetzel, Marshall, in Tyler; that is all I can recollect of.
- Q. In four counties, and of course you took those leases for the same purpose as you took these leases here in Illinois?
- A. Which?
- Q. For the purpose of operating?
- A. Yes, sir.
- Q. And did operate them, of course?
- A. Not all of them, no, sir.
- Q. Changed your mind after you took the leases?
- A. Well, I like most anyone else thought the stuff wasn't worth going after.
- Q. And that is true in the West Virginia leases, after you got them and paid for them you considered they were not worth anything, and sold them to somebody else.
- A. Some of them—this is the first lease I ever sold in my life.
- Q. Did you operate in West Virginia?
- A. I did, with some other parties, yes, sir.
- Q. Where did you operate in West Virginia?
- 64 A. Well, in Marshall County.
- Q. In Marshall County?
- A. Yes, sir.
- Q. What lease?
- A. Now, what do you mean by "operate?"
- Q. Oh, you know what operating is. You evidently knew what it was all right, because you said you took them for that purpose fifteen years, so you must have known what operating was when you took the leases, because you took them for that purpose.
- A. Well, I see; you want to know who I was with operating?

Q. No, I want to know on whose land you operated in Marshall County, West Virginia.

A. Well, on the Crisswell lease, we did.

Q. You operated there?

A. I helped operate on it, yes sir.

Q. All right. How much help did you give?

A. I put in a little over \$1500 in it.

Q. What lease was that?

A. The Crisswell.

Q. Criss?

A. Crisswell.

Q. What Criss?

A. Crisswell.

Q. Oh, Crisswell.

A. Yes.

Q. On the Crisswell lease? How many wells?

A. Oh, we only drilled one.

Q. A dry hole?

A. Yes, sir.

Q. What Crisswell was it?

A. E. A. Crisswell.

Q. E. A.?

A. Yes, sir.

Q. Who was associated with you in that lease?

A. Well there was Doc Davis.

Q. Scott Davis?

A. Doc.

Q. Who else?

A. E. F. Romine.

Q. Who else?

A. G. W. Bowers.

Q. Who else?

65 A. I forget the other fellow's name now; he lived in Pennsylvania.

Q. Now, that was in Marshall County, West Virginia?

A. Yes, sir.

Q. On the E. A. Crisswell lease?

A. Yes, sir.

Q. That you invested in that enterprise \$1,500?

A. Yes sir.

Q. Associated with those other people?

A. Yes sir.

Q. And put down a dry hole?

A. Yes, sir.

Q. What district was that in?

A. Why, that was in Liberty.

Q. Now, in those other counties that you have named in which you took leases, operate any there?

A. No, sir; I have been in with other parties that did, though; I bought an interest in wells.

Q. You took leases in your own name in those other counties?

A. Yes, sir.

Q. What did you do with the leases?

A. I surrendered them to the farmers.

Q. Surrendered them,—gave them up?

A. Yes sir.

Q. You never produced a barrel of oil in your life, did you?

A. Yes, sir.

Q. Where?

A. Marshall County.

Q. Marshall County,—where?

A. That is Marshall County, West Virginia.

Q. On what lease?

A. Well I had quite a number of them, that is royalties bought

Q. Oh, bought royalties, somebody else did the operating?

A. Yes, sir.

Q. I understood you was the operator. Did you ever as operator produce a barrel of oil in your life?

A. Yes, sir; I did in Monroe County, Ohio.

Q. Monroe County, Ohio? When was that?

A. That was in '95.

Q. On what lease?

A. On the Barker lease.

66 Q. You took that lease in your own name?

A. No, sir; I bought an interest in it.

Q. You bought an interest in it after somebody else had developed it?

A. No, sir; I bought it before it was developed.

Q. About a quarter of it?

A. No, about an eighth of it.

Q. An eighth of it. From whom?

A. Bought it from David Levi.

Q. And you and somebody else put down a well there?

A. Yes, sir.

Q. And produced a barrel of oil?

A. Yes, a little more than a barrel.

Q. How much?

A. Made about fifty-barrel- a day.

Q. For how many days?

A. Well I couldn't say how long it ran.

Q. Well, one well?

A. No, drilled three.

Q. All producers?

A. Yes, sir.

Q. What Barker was that?

A. The Barker lease.

Q. What is his first name?

A. I couldn't tell you now. I didn't take the lease.

Q. When did you come to the Illinois field?

A. Four years ago last January.

Q. What did you do in the Illinois field?

A. I took up some leases.

Q. In addition to these Smith leases?

A. Yes, sir.

- Q. Took them for the purpose of operating, too?
- A. Yes, sir; or have them operated.
- Q. And operated them all?
- A. No, sir.
- Q. Just as you did the Smith leases?
- A. No, sir; I didn't say so.
- Q. What did you do with those leases?
- A. I give Mr. Gillespie an interest in one block of them and he operated it, had an interest in it only.
- Q. What leases did you take that Gillespie operated?
- A. The Geyer block of leases in Crawford County.
- Q. Wells on the Geyer?
- A. No, sir.
- 67 Q. But you didn't operate, just simply took the leases and turned them over to somebody else?
- A. No, a dry well on it.
- Q. I asked you what operating you have done in the Illinois field?
- A. Oh, I haven't done any.
- Q. Haven't done any operating in the Illinois field. But have been taking, and for four or five years been engaged in taking leases, haven't you?
- A. Not steady, I haven't.
- Q. Well, but that has been your principal business, taking leases in the Illinois field?
- A. No, not in Illinois fields, it hasn't.
- Q. Well, what has been your business then in the Illinois field?
- A. How I came to sell that lease do you want to know?
- Q. No, what has been your business in the Illinois field?
- A. Well, I was out there to lease some land.
- Q. Yes, take leases in your own name?
- A. Yes, sir.
- Q. And you never operated a single well for a minute in Illinois, did you?
- A. No, sir.
- Q. You were still taking them for that purpose, were you, to operate?
- A. Yes, sir.
- Q. And that you tell the court was the purpose you had in taking these Smith leases, was the purpose of operating them yourself?
- A. Or have them operated, yes, sir.
- Q. Oh, or have them operated. Why didn't you operate them?
- A. Well, because I was going into other business at the time, a short time after that; that is how I came to sell the lease.
- Q. Yes, soon after you got hold of the Smith leases you concluded to go into some other line of business, is that right?
- A. Oh, quite a little while afterward.
- Q. You referred to a conversation that occurred between you and Mrs. Smith and Mr. Smith. Did you give all the conversation?
- A. Oh, I don't know as I gave all of it.

68 Q. There was something else said there that you have not given?

A. Not to my recollection.

Q. But they told you, did they, why they were leasing that land?

A. Why, certainly they did.

Q. Certainly, they did; and what did they say about it?

A. I don't know just exactly what she said now.

Q. They didn't tell you that they wanted to lease it for 25 cents a year, did they?

A. They said they were perfectly satisfied to have 25 cents a year.

Q. No; but they didn't tell you that that was their purpose in leasing, was to get 25 cents a year, that they were executing this lease, but they told you they had another purpose in view, didn't they?

A. No, sir; they did not.

Q. Didn't they say they wanted you to operate it?

A. No, sir; they didn't not the present time.

Q. You didn't say anything to them about operating?

A. No, sir; I didn't say anything to them about operating.

Q. Didn't you say to them that you was an oil operator?

A. No, sir; I don't know as I told them I was.

Q. What is it?

A. I don't think I did; I wouldn't say positively about that.

Q. I will ask you if she didn't say and Mr. Smith also say there in that conversation that they were anxious to have their premises developed and that you said to them that you was an oil operator and that that was your purpose in taking that lease and that you would proceed to develop it?

A. No, sir; I didn't tell them anything of the kind.

Q. Wasn't a word said about operating?

A. No, sir.

The MASTER: Let me understand, is that 25 cents a year for the lease or 25 cents an acre?

Mr. HINDMAN: He says 25 cents a year.

The WITNESS: Twenty-five cents per acre.

Mr. HINDMAN: The lease doesn't say so.

Q. You wrote the lease?

A. Yes, sir.

Q. Didn't you?

69 A. Yes, sir.

Q. You, of course, wouldn't make a contract with a widow woman and then write something else in the lease, would you?

Mr. LOWE: Now, we object to that.

The MASTER: Well, that is hardly proper.

Q. You didn't do it in this instance, did you?

Mr. TROUP: Now, we object to that.

The MASTER: Objection sustained.

Mr. LOWE: Now, let's be a lawyer all the way through, Mr. Hindman.

Mr. HINDMAN: I believe it is competent; you went into it.

Q. Now, you say that she said she wanted twenty-five cents an acre a year?

A. Twenty-five cents an acre a year?

Q. Is that what she said?

A. She didn't say anything about that.

Q. She didn't say anything about that?

A. I said I would give her twenty-five cents per acre a year.

Q. Then why didn't you put that in the contract that you wrote?

A. Well, I will tell you that was a misprint in the lease and I never discovered it until afterward.

Q. A misprint?

A. Yes, sir; that is how that came about.

Q. How long did you hold this lease after you took it until you disposed of it?

A. November, I think it was.

Mr. HINDMAN: There was a question there that was not answered. I withdraw it.

Q. Coming back to that 25 cents, you say that was printed in the lease?

A. No, not the 25 cents was not.

Q. No—

A. I say there was a misprint in the lease, in the form of the lease there?

Q. A misprint?

A. Yes, sir.

Q. There was a blank left?

A. Yes, sir.

Q. For you to insert the amount of rental you was to pay?

A. Yes, sir.

70 Q. And instead of inserting 25 cents per acre you simply inserted 25 cents per year?

A. Yes, that was an error of mine, I didn't intend to do it.

Q. Yes. So it was not a misprint at all. It was because you had—

A. I think there is an error in that lease anyhow, I ain't certain, let me see that.

Q. You simply inserted 25 cents and instead of saying 25 cents per acre you said 25 cents per year, didn't you?

A. One of those leases I didn't write. Mr. Pierce wrote one of them and I wrote the other; he was along with me.

(Mr. Hindman hands paper to witness.)

The WITNESS: This is the one I drew; that ought to have been 25 cents per acre.

Q. Why didn't you insert "per acre"?

A. Well, I forgot it; that was just an error of mine.

Q. Yes, it was an error of yours and not a misprint?

A. Yes, sir.

Q. Isn't it true now that this lease was written and taken by Mr. Pierce, a man by the name of Pierce?

A. I wrote one of them and he wrote the other. He was along with me when——

Q. In which one did you write (handing paper to witness)——

A. I wrote this one.

The MASTER: Well, refer to it by Exhibit number.

Q. The one marked Exhibit 1, that you wrote?

A. Yes.

Q. And Pierce wrote the one marked Exhibit 4?

A. Yes, sir.

Q. Do you know why, if your agreement with that woman was that she should have 25 cents per acre that both you and Mr. Pierce made the same mistake and wrote it 25 cents per year—how?

A. I say I see it now.

Q. You cannot explain why you and Mr. Pierce both made the same mistake?

A. No, sir; I can't.

Q. How long did you keep this lease in your name?

A. I think it was until November in the same year; I think that is when it was.

Q. If you took this for the purpose of operating, why didn't you put down a well?

71 Mr. LOWE: I object to that, your Honor.

The MASTER: Oh, I don't see what that has got to do with it.

Mr. LOWE: Not a thing on earth.

Mr. HINDMAN: Why, it goes to the good faith as to whether he did take it for that purpose. We objected to it when they went into it. He said he took it for the purpose of operating. Now, if his conduct is not in harmony with his declaration I think we have a right to have his conduct.

The MASTER: Well, I can't see what his intention, for what purpose he took it is material at all.

Mr. LOWE: Not a bit on earth, except they made the allegation. It has no bearing on the case.

Mr. HINDMAN: I really don't believe it has, but they went into it and I objected to it. They insisted it was competent then and if it was competent then it is competent now.

Mr. LOWE: We explained why we went into it. This gentleman lives in West Virginia and we wanted to submit his testimony while he is here. We couldn't bring him back very well in rebuttal and I thought we would offer it while he was here, in chief, just to show why he did take it, and that was the sole purpose of it. Now, they are taking him all over the State of West Virginia?

The MASTER: Well, I assumed that it was material because you both insisted on it. I was just simply asking the question.

Mr. LOWE: Well, that is the only purpose for which we took it.

The MASTER: Well, if you went into it, of course, they can cross-

examine, but I can't see at the present time how it is material either way.

Mr. HINDMAN: I don't, either.

The MASTER: Go ahead.

(Question read.)

A. Well, one thing because there was no pipe line in there. It was 15 miles ahead of development when the lease was taken.

Q. What was the other thing? You say that that was one thing.

A. Well, that was the main difficulty, the main thing.

Mr. LOWE: Well, I object to this dilly-dallying along with the witness.

72 Q. That was your only reason, was it?

A. At the present time, yes sir.

Q. Was there a pipe line in there at the time you sold it?

A. No, sir.

Q. For \$11?

A. No, sir.

Q. You sold both of those leases for \$11?

A. Yes, sir.

Q. You sold at the same time the other leases that you had taken in Illinois?

Mr. LOWE: To that we object, your Honor, not cross-examination.

The MASTER: I don't believe anything was asked about that.

Mr. HINDMAN: No, I don't think it is very material at all.

Redirect examination by Mr. LOWE:

Q. Counsel asked you if this was an error you made of 25 cents per year. I will ask you if at the time that lease was written you did not honestly believe that so much per acre was printed in the lease?

A. No, sir; I did not.

Q. You didn't think it was in there?

A. The contract was to pay 25 cents per acre a year.

Q. And when you wrote the lease as it is did you think it expressed that, did you believe that it did?

A. No, sir.

Q. Did you believe that it expressed 25 cents per acre a year?

A. When I wrote the lease, I thought it did, yes sir.

Q. And when did you first find it out?

A. Why, not until last April, I think it was; up in Mr. Gillespie's—Mr. Gillespie showed me the lease at Mr. Carter's office.

—Mr. Gillespie showed me the lease at Mr. Carter's office.

Q. And that is the first time you knew anything at all that it was otherwise?

A. Yes sir.

Q. Then I will ask you if at the time Mrs. Smith signed this lease you believed and she believed that it was in there that you was to pay 25 cents per acre a year.

Mr. HERRMAN: Now, we object.

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The MASTEN: He can state his belief, but he wouldn't know what she believed.

Exception by complainants.

Q. Well, what did you believe about it then?

A. Why, it was the understanding I was to give her 25 cents per acre per year.

Q. Well, did you believe it was in the house at the time?

A. Yes, I did.

Mr. LOVE: You may be excused.

Testimony of R. L. Prosser.

Mr. R. L. PROSSER, a witness called on behalf of complainant, being first duly sworn, was examined in chief by Mr. LOVE, and testified as follows:

Q. What is your name, occupation and place of residence?

A. R. L. Prosser, Moundsville, West Virginia.

Q. Age?

A. Forty-six.

Q. And what is your business?

A. I am employed in the logging department for the complainants in this case.

Q. For whom were you employed in November, 1905?

A. E. N. Gillespie.

Q. What was your business at that time, Mr. Prosser?

A. Lending land and paying rentals and purchasing loans.

Q. Did you purchase any loans from M. A. Walton?

A. Yes, sir.

Q. For whom were you acting at that time?

A. For E. N. Gillespie.

Q. I now hand you Exhibit 1 (handing paper to witness) and ask you to examine it and ask you to state from whom you purchased the loans?

A. Yes, I purchased that loan from M. A. Walton.

Q. For whom?

A. E. N. Gillespie.

Q. I hand you exhibit 2 (handing paper to witness) and ask you if you purchased that loan and if so from whom?

A. Yes, sir; I purchased that loan from M. A. Walton.

Q. For whom?

A. E. N. Gillespie.

Q. What did you do with it after you got it?

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A. I signed it to E. N. Gillespie.

Q. I hand you Exhibit 3 (handing paper to witness) and ask you what that is.

A. That is an assignment of the loan to E. N. Gillespie.

Q. By whom?

A. By myself.

Q. And what is your name?

Q. D. L. Fromer.

Q. Who signed the name D. L. Fromer there?

Q. Who signed the name D. L. Fromer there?

A. I did.

Q. I now hand you Exhibit 8 (handing paper to witness) and ask you what this is.

A. That is an assignment of the entire loan to D. F. Williams to myself.

Q. Whose signature is signed there?

A. Mine.

Q. Give what it is.

A. D. L. Fromer.

Q. Who signed it?

A. I did.

Q. At the time you made these assignments, Mr. Fromer, what did you intend to assign to Mr. D. F. Williams?

Mr. Fromer: Oh, I agree to that. I speak for both.

Mr. Warren: Doesn't the assignment show?

Mr. Fromer: Why, there is no need to that and no thing to be said. The date is in December 1905 and he says the assignment was signed and given to him by Walter Davidson 1905, 1906 and should have been November 15, 1905, and no thing that is the fact.

Mr. Davidson: Well that is a different question entirely from the question asked.

Mr. Warren: You were referring to the date of the loan?

Mr. Fromer: No, the date of the assignment.

Mr. Warren: Well you are all here about this loan.

Exception by Defendant.

Q. Is your assignment to Williams you and the loan; the assignment was made December 15, 1905. What month did this loan issue, what was the date intended to be?

A. It should have been in November. I was just as sure to the assignment from Walter to myself.

Q. What did you intend to assign?

A. The loan to D. F. Williams.

Q. What Exhibit —?

A. Exhibit No. 2.

Q. Now, what loan did you intend to assign by the assignment entered on the back there?

A. Exhibit No. 2.

Q. Now, I will hand you Exhibit No. 3 (handing paper to witness), what loan did you intend by the assignment that is entered to D. F. Williams by that assignment?

A. Exhibit No. 3.

Q. I believe you stated for effect you were making a loan loan?

A. For D. F. Williams, yes.

Q. Was there any discussion between you and Walter as to the amount of money to be paid?

Mr. Davidson: We agreed to that. Certainly the discussion by some there could not be said so.

The MASTER: How could that be material?

Mr. LOWE: Just simply to show the purpose of the parties, nobody misled, no harm done, or anything of the kind, and that they were to pay what the real contract was and we will follow it up by proof to show that that was paid all the time.

Mr. HINDMAN: A conversation between two agents of the company would not bind us.

The MASTER: Doesn't Mr. Gillespie in his bill here aver that he paid at the rate of 25 cents an acre?

Mr. LOWE: Yes, sir.

The MASTER: Well if they then adopted that contract I don't see how the discussion would be material.

Mr. YOUNG: Well I think it is material in this way. We can show the understanding that passed on both sides of this contract. Now, Mr. Walton has testified that his understanding was and that Susannah Smith's understanding was that they were to pay 25 cents per acre per year. Now, we have testimony here to show that M. A. Walton's testimony and that is the understanding that has extended from Walton down to the present holders of the lease. I think it is clearly competent for that purpose.

The MASTER: I think the proper way to show it would be—He has given his evidence, now, what construction the holders of the lease put upon it by the amounts they have paid.

Mr. LOWE: Yes, sir. Now, we can show that.

Mr. HINDMAN: You are asking for conversations between this person and somebody else not had in the presence of any of us.

Now, if there is any rule of evidence that is well established, 76 it is that conversation between third parties in our absence is not competent.

The MASTER: I say the proper way to show it would be by the construction placed by the parties by their act, to show that they had adopted the contract as explained by Mr. Walton.

Mr. LOWE: Yes, I will withdraw the question, your Honor.

Mr. LOWE: We now offer in evidence Exhibits 1, 2, 3, 4, 5 and 6.

The MASTER: If there is no objection, they will be admitted.

(Copies of which said Exhibits are as follows:)

EXHIBIT (1).

Exhibit 1—Agreement of May 22, 1905.

Counsel for complainants offered in evidence, Exhibit 1, a copy of which exhibit is in the words and figures following, to-wit:

Agreement, Made and Entered Into the 22 Day of May, A. D. 1905, By and Between Susannah Smith, Licking Township, of Crawford County, and State of Illinois, Party of the First Part, and M. A. Walton, Party of the Second Part.

Witnesseth, that the said party of the first part for and in consideration of the sum of One Dollar to — in hand well and truly

paid by the said party of the second part, the receipt of which is hereby acknowledged, and the covenants and agreements herein-after contained on the part of the said party of the second part, to be paid, kept and performer, has granted, demised, leased and let and by these presents does grant, demise, lease and let unto the said party of the second part, his heirs, executors, administrators and assigns, for the sole and only purpose of mining and operating for oil and gas and of laying pipe lines, and of building tanks, stations and structures thereon to take care of the said products. All that certain tract of land situate in Licking Township, Crawford County, and State of Illinois, on the waters of —, bounded substantially as follows: The S. E. of N. E. Sec. 2, T. 8, R. 14, containing 40 acres, and the North half of the N. E. of Southeast of Sec. 2, in T. 8, Range 14, containing 20 acres and part of the N. W. of the N. E. of Sec. 11, T. 8, R. 14, containing 30 acres of Crawford County, Illinois, containing 90 acres, more or less, and being same

land conveyed to the first party, by — by deed, bearing date — I, — — — reserving, however, therefrom 200 feet
77 around the buildings on which no well shall be drilled by either party except by mutual consent.

It is agreed that this lease shall remain in force for the term of five years from this date, and as long thereafter as oil or gas, or either of them, is produced therefrom, by the party of the second part, her heirs, executors, administrators or assigns.

In Consideration of the Premises the said party of the second part covenants and agrees; 1st—To deliver to the credit of the first party, her heirs, or assigns, free of cost, in the pipe line to which it may connect its wells, the equal ($\frac{1}{4}$) part of all oil produced and saved from the leased premises; and 2d—to pay \$100.00 Dollars per year for the gas from each and every gas well drilled on said premises, the product of which is marketed and used off the premises said payment to be made on each well within sixty days after commencing to use the gas therefrom, as aforesaid, and to be paid yearly thereafter while the gas from said well is so used.

Second party covenants and agrees to locate all wells so as to interfere as little as possible with the cultivated portions of the farm. And further, to complete a well on said premises within 9 months from the date hereof, or pay at the rate of 25c cents per yr. quarterly in advance, for each additional three months such completion is delayed from the time above mentioned for the completion of such well until a well is completed; and it is agreed that the completion of such well shall be and operate as a full liquidation of all rental under this provision during the remainder of the term of this lease.

Such payments may be made direct to the lessor or deposited to her credit in Exchange Bank, at Martinsville, Ill.

It Is Agreed, that the second part- is to have the privilege of using sufficient water from said premises to run all machinery necessary for drilling and operating thereon, and at any time to remove all machinery and fixtures placed on said premises; and, further, upon the payment of 1.00 Dollar, at any time, by the party of the second

part, heirs, successors, or assigns, to the party of the first part, heirs, successors or assigns, said party of the second part, heirs, successors, or assigns, shall have the right to surrender this lease for cancellation, after which all payments and liabilities thereafter to
 78 accrue under and by virtue of its terms shall cease and determine, and this lease become absolutely null and void.

Witness the following signatures and seals:

SUSANNAH SMITH, [SEAL.]

Witness:

T. E. PIERCE.

(On the reverse side of the foregoing appears:)

STATE OF ILLINOIS,

County of Crawford, ss:

I, W. D. Holly, a Notary Public, in and for said County, in the State aforesaid, do hereby certify that Sussanna Smith, widow, personally known to be the same person whose name is subscribed to the foregoing instrument appeared before me this day in person, and acknowledged that she signed, sealed and delivered the said instrument as her free and voluntary act, for the uses and purposes therein set forth.

Given under my hand and official seal, this ninth day of June, A. D. 1905.

(Signed)

W. D. HOLLY,

Notary Public.

COMPLAINANTS' EXHIBIT 2.

Exhibit 2—Assignment of M. A. Walton.

I, M. A. Walton, for and in the consideration of the sum of Five Dollars, the receipt of which is hereby acknowledged do hereby, sell, transfer, assign, and set over unto R. L. Prosser the within lease or agreement, together with all covenants and agreements therein contained, Nov 13, 1905.

[SEAL.]

M. A. WALTON.

STATE OF W. VA.,

Marshall County, ss:

I, W. H. Loper, a Notary Public, do hereby certify that M. A. Walton, whose name is signed to the writing above, bearing date Nov. 13, 1905, has this day acknowledged the service before me this 13th day of November, 1905.

(Signed)

[SEAL.]

W. H. LOPER,

Notary Public.

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(On the cover hereof appears:)

No. 73. Oil And Gas Lease, from Susannah Smith, Bell Air, Crawford Co., Illinois, to M. A. Walton, date, May 22, 1905;

Term five years. No. Acres, 90 acres. Location: Township Licking; County, Crawford.

No. 4842.

STATE OF ILLINOIS,
Crawford County, ss:

This instrument was filed for record in the recorder's office of Crawford County, aforesaid, on the 15th day of June, A. D. 1906, at one o'clock P. M., and recorded in Book 1 of Leases, on page 452.

(Signed)

HENRY O. W. WILKIN, *Recorder.*

\$1.00 paid.

Counsel for complainants offered Exhibit 4, in evidence, a copy of which in words and figures is as follows:—

Exhibit 4—Reassignment of R. L. Prosser.

Cameron Hardware Company, Dealers in Builders' Supplies, Paints, Oil Varnishes, and Everything in the Hardware Line.

CAMERON, W. VA., 190-.

STATE OF W. VA.,
Marshall Co., To wit, ss:

Dec. 26, 1905.

For And In Consideration of the sum of one Dollar the receipt of which is hereby acknowledged, I, R. L. Prosser, do hereby transfer, sell, reassign, and set over the within lease together with all covenants and agreements therein contained to E. N. Gillespie of Freeport, Pa., it being all that tract of land situate in Licking Township, Crawford Co., Ills., of which Susannah Smith delivered, leased and let unto M. A. Walton, and assigned to the said R. L. Prosser the 13th day of Dec. '05, containing 90 acres more or less.

In Witness, I set my hand and seal this 26th day of Dec., '05.

(Signed)

R. L. PROSSER.

80 STATE OF W. VA.,
Marshall County, ss:

I, C. Y. McCardle, a Notary Public of the said County of Marshall, do certify that R. L. Prosser, whose name is signed to the writing above, being date the 26th day of Dec. '05, has this day acknowledged the same before me, in my said County. Given under my hand this 26th day of Dec., 1905.

(Signed)

C. Y. McCARDLE,
Notary Public.

(Stamped on the reverse side of the foregoing:)

No. 4847.

STATE OF ILLINOIS,
Crawford County, ss:

This instrument was filed for record in the Recorder's office of Crawford County, aforesaid on the 15th day of June, A. D. 1906, at 1 o'clock p. m., and recorded in book 1 of Leases at page 460.

(Signed)

HENRY O. W. WILKIN, *Recorder.*

50c paid.

Counsel for complainants offered in evidence Exhibit 4, a copy of which is in the words and figures following:

Exhibit 4—Agreement of May 22, 1905.

Agreement, Made and entered into the 22d day of May, A. D. 1905, by and between James A. Smith of Licking Township, County of Crawford, and state of Illinois, party of the first part, and M. A. Walton, party of the second part.

Witnesseth, that the said party of the first part, for and in consideration of the sum of one Dollar to — in hand well and truly paid by the said party of the second part, the receipt of which is hereby acknowledged; and the covenants and agreements hereinafter contained on the part of the said party of the second part, to be paid, kept and performed, has granted, demised, leased and let and by these presents do grant, demise, lease, and let unto the said party of the second part, heirs, executors, administrators and assigns, for the sole and only purpose of mining and operating for oil and gas, and of laying pipe lines, and of building tanks, stations and structures thereon to take care of the said products, All that certain tract of land situate in Licking Township, Crawford County, and State of Illinois, on the waters of — bounded substantially as follows: West half of the N E of the N. E. of Sec. 11, Township 8, Range 14, West, all in Crawford County, Ill., containing 20 acres, more or less, and being same land conveyed to the first party by — — reserving, however therefrom 200 feet around the buildings on which no well shall be drilled by either party except by mutual consent.

"It is agreed that this lease shall remain in force for the term of five years from this date, and as long thereafter as oil or gas, or either of them, is produced therefrom by the party of the second part, their heirs, executors, administrators or assigns.

In Consideration Of The Premises the said party of the second part covenants and agrees; 1st—To deliver to the credit of the first party his heirs, or assigns, free of cost, in the pipe line to which it may connect its wells, the equal $1/8$ part of all oil produced and saved from the leased premises; and 2d—to pay \$100.00 Dollars per year for the gas from each and every gas well drilled on said premises, the product of which is marketed and used off the premises said payment to be made on each well within sixty days after commence-

ing to use the gas therefrom, as aforesaid, and to be paid yearly thereafter while the gas from said well is so used.

Second party covenants and agrees to locate all wells "so as to interfere as little as possible with the cultivated portions of the farm. And further, to complete a well on said premises within 9 months from the date hereof, or pay at the rate of 25 cents per year quarterly, in advance, for each additional three months such completion is delayed from the time above mentioned or the completion of such well until a well is completed; and it is agreed that the completion of such well shall be and operate as a full liquidation of all rental under this provision during the remainder of the term of this lease.

Such payments may be made direct to the lessor or deposited to his credit in Exchange Bank, Martinsville, Ill.

It is agreed that the second party is to have the privilege of using sufficient water from said premises to run all machinery necessary for drilling and operating thereon, and at any time to remove all machinery and fixtures placed on said premises; and, further, upon the payment of One Dollar, at any time, by the party of the second part, heirs, successors or assigns, to the party of the first part — heirs, successors or assigns, said party of the second part — heirs, successors or assigns, shall have the right to surrender this lease for cancellation, after which all payments and liabilities thereafter to accrue under and by virtue of its terms shall cease and determine, and this lease become absolutely null and void.

(Signed)

JAMES A. SMITH. [SEAL.]

Witness the signatures and seals.

T. E. PIERCE.

(On the reverse side of the foregoing appears:)

STATE OF ILLINOIS,
County of Crawford, ss:

I, W. D. Holly, a Notary Public in and for said County, in the State aforesaid, do hereby certify that James A. Smith, single, personally known to be the same person whose name is subscribed to the foregoing instrument appeared before me this day in person, and acknowledged that he signed, sealed and delivered the said instrument as his free and voluntary act, for the uses and purposes therein set forth.

Given under my hand and official seal, this ninth day of June, A. D. 1905.

(Signed)

[SEAL.]

W. D. HOLLY,
Notary Public.

Exhibit 5—Assignment of M. A. Walton.

COMPLAINANTS' EXHIBIT 5.

STATE OF WEST VA.,
Marshall Co., To wit: ss:

For And In Consideration Of The sum of Five Dollars, the consideration of which is hereby acknowledged, I, M. A. Walton, do hereby transfer, sell assign, and set over the within lease, together with all covenants, and agreements therein contain-d, to R. L. Prosser, being all that tract of land, situated in Licking Township Crawford County, Ill., of which James A. Smith, demised
 83 leased and let unto the said M. A. Walton, containing 20 acres, more or less.

(Signed)

M. A. WALTON.

Signed and acknowledged before the undersigned, a Notary Public in and for County of Marshall, State of West Virginia, this 13th day of Nov. 1905.

(Signed)

W. L. HOPER,

[SEAL.]

Notary Public.

(On cover appears:)

No. 74. Oil and Gas Lease, from James A. Smith, Bell Ave. Crawford Co., Illinois, to M. A. Walton, Date, May 22, 1905, term five years, No. Acres, 20 Acres. Location, Township, Licking County, Crawford; Received for Record, 190—; Recorded —.

No. 4844.

STATE OF ILLINOIS,
County of Crawford, ss:

This instrument was filed for record in the Recorder's office at Crawford County aforesaid, on the 15th day of June, A. D. 1905 at 1 o'clock P. M., and recorded in book of Leases at page 450.

(Signed)

HENRY O. W. WILKIN, *Recorder.*

Exhibit 6—Reassignment of R. L. Prosser.

Counsel for complainants offered in evidence Exhibit 6, a copy of which is in the words and figures following:

Cameron Hardware Company, Dealers in Builders' Supplies, Paints, Oils, Varnishes, and everything in the Hardware Line.

CAMERON, W. Va, 190—

STATE OF W. VA.,
Marshall Co., To wit, ss:

Dec. 26, 1905.

For And In Consideration of the sum of One Dollar the Receipt of which is hereby acknowledged, I, R. L. Prosser, do hereby
84 transfer, sell, reassign and set over the within lease together with all covenants and agreements therein contained to E. N. Gillespie, of Freeport, Pa., it being all that tract of land situated in Licking Township, Crawford Co., Ills., of which James A. Smith delivered, leased and let unto M. A. Walton, and assigned to the said R. L. Prosser the 13th day of Nov. 1905, containing 20 acres more or less.

In Witness whereof I set my hand and seal this 26th day of December.

(Signed)

R. L. PROSSER.

STATE OF W. VA.,
Marshall County, ss:

I, C. Y. McCardle, Notary Public, of said County of Marshall, do certify that R. L. Prosser, whose name is signed to the writing above, bearing date the 26th day of Dec., 1905, has this day acknowledged the same before me in my said County.

Given under my hand this 26th day of Dec., 1905.

(Signed)

C. Y. MCCARDLE,

[SEAL.]

Said Notary Public.

(On the reverse side of foregoing appears:)

No. 4846.

STATE OF ILLINOIS,
County of Crawford, ss:

This instrument was filed for record in the Recorder's office of Crawford County, aforesaid, on the 15th day of June, A. D. 1906, at 1 o'clock P. M. and recorded in Book 1 of Leases on page 461.

(Signed)

HENRY O. W. WILKIN, Recorder.

50c paid.

Testimony of R. L. Prosser.

Q. Did you do anything further in this case by way of serving notice, or anything of that kind, Mr. Prosser?

A. Well I served a notice about March 9th, on James A. and Mrs. Smith.

Q. Well now who do you mean by Mrs. Smith—Susannah Smith?

A. Susannah Smith.

Q. What year was that?

85 A. It was in 1907.

Q. I hand you Exhibit 7 (handing paper to witness) and ask you what that is.

A. That is a notice given to James A. Smith.

Q. Did you serve that on anyone?

A. Yes, sir.

Q. Who?

A. I left that with James A. Smith's wife and mother at Mrs. Smiths' residence, Susannah Smiths' residence.

Q. When did you do that?

A. March 9th.

Q. What year?

A. 1907.

Q. I now hand you Exhibit 8 (handing paper to witness); what is that?

A. That is a notice served on Susannah Smith at her residence.

Q. Did you serve it on anybody else?

A. On Fred King.

Q. Who was Fred King?

A. He was the King of Evans, King and Company.

Q. Why did you serve it on him?

A. Mr. Gillespie in trying to get hold of the real owners of the property—he was trying to serve it on the right party and I understood Mr. King had an interest in the lease, and therefore found Mr. King and served the notice on him.

Q. I now hand you Exhibit 9 (handing paper to witness) and ask you what that is.

A. That is a registry returned receipt of the notice that was sent by register—notice to Willett & Little, Buffalo, New York.

Q. Who sent that?

A. I did.

Q. Well, how is it signed?

A. Signed by Lewis E. Willett.

Q. I will ask you if it is not Little & Willet instead of——

Mr. SIMMONS: Now, your Honor, I object to that in behalf of Little & Willett.

Mr. LOWE: It speaks for itself, of course, I want it for identification.

Mr. SIMMONS: Well I don't know whose signature it is.

Mr. LOWE: Well, I am just asking.

86 The WITNESS: I was mistaken in looking at it there; it is Little & Willett.

Mr. SIMMONS: I understand that that is not proper.

Q. I am now asking you what Exhibit 9 is.

Mr. HINDMAN: I object to that Exhibit 9 will speak for itself.

The MASTER: He has identified it is a registry return receipt from the notice mailed.

Q. Yes, sir, and it is signed by whom?

Mr. SIMMONS: Well, now, we object to that.

The MASTER: Well he of course couldn't testify to the signature. Exception by complainants.

Q. I will ask you this question: what names are signed to the receipt?

Mr. HINDMAN: Now, we object to that.

The MASTER: The receipt shows for itself.

Mr. LOWE: I only want it for identification, your Honor.

Mr. HINDMAN: Well it is identified as Exhibit 9.

Mr. LOWE: Well if the court has that view.

The MASTER: Why, certainly, the Exhibit shows what is on it. Exception by complainants.

Q. Now, was there anything sent with this card?

A. There was a notice.

Mr. HINDMAN: We object to that.

Q. Who sent the notice?

A. I did.

Q. Is this a copy of it, or not?

A. Yes, sir; that is a copy of the notice.

Q. I now hand you Exhibit 7 and ask you if you mailed a copy of that to any person or persons, and if so who they were?

A. I mailed a copy of this by registered mail to Little & Willett, Buffalo, New York.

Q. Was that in an envelope?

A. Yes, sir.

Q. Postage prepaid or not?

A. Postage prepaid.

Q. You stated it was registered, didn't you?

A. Yes, sir; it was registered.

Q. Did you get any receipt?

A. Yes, sir.

Q. Acknowledging receipt of the letter?

87 A. I did.

Q. I hand you Exhibit 9 (handing paper to witness) and ask you if that is what you received. See on the other side to whom it is addressed.

A. Yes, sir; that is the receipt.

Q. Are you the person who mailed that?

A. Yes, sir.

Q. For whom did you mail it?

A. E. N. Gillespie.

Mr. LOWE: We offer in evidence Exhibits 7, 8 and 9.

The MASTER: Do you want to examine him in reference to these before they are offered?

Mr. HINDMAN: Well I don't think we care to cross-examine but we desire to object in the first place as to the present defendants in this case for the reason that no notice was served upon them, and notice upon Mrs. Smith would not bind Walter Hennig, and the other defendants in this case, being long after we had acquired our interest in the premises.

The MASTER: Well if any of those people were in possession at that time I will admit the notice.

Exception by defendants.

Exhibit 7—Notice of Possession.

Counsel for complainants offered in evidence Exhibit 7, a copy of which is in the words and figures following:—

STATE OF ILLINOIS,
Crawford County, ss:

To Little & Willett Oil and Gas Company, Lewis E. Willett, James A. Smith:

You and each of you will take notice that the undersigned is entitled to possession of the following-described real estate, situated in the County of Crawford, State of Illinois, to-wit:—

West half of the N. E. of the N. E. of Section 11, Township 8, Range 14 west, all in Crawford County, Illinois, by virtue of a lease executed by James A. Smith to M. A. Walton, dated 22 day of May, A. D. 1905, and by him assigned to R. L. Prosser, and by R. L. Prosser assigned to the undersigned and that the undersigned has complied with the terms and conditions of said lease and is entitled to possession of the same for the purpose of drilling thereon 88 for oil and gas and by the terms of said lease he is entitled and you and each of you are hereby notified to keep off said premises for the purpose of drilling thereon for "oil or gas or operating any wells that may be drilled on said premises and you and each of you are hereby notified to keep off the said premises for any purpose whatever.

Dated at Robinson, Illinois, this 8th day of March, A. D. 1907.

(Signed) E. N. GILLESPIE,

For GUFFEY, GILLESPIE & PITCAIRN.

STATE OF ILLINOIS,
Crawford County, ss:

R. L. Prosser, being duly sworn according to law deposes and says that he served the above and foregoing notice on James A. Smith, by leaving a copy of the same at his residence, with his wife

on March 9, 1907, and at the same time he left with her a copy of the same.

R. L. PROSSER.

Subscribed and sworn to before me this 16th day of March, 1907.

[SEAL.]

G. V. PARKER,
Notary Public.

Exhibit 8—Notice of Prior Lease.

Counsel for complainants offered in evidence Exhibit 8, a copy of which is in the words and figures as follows:

STATE OF ILLINOIS,

Crawford County, ss:

To Lewis E. Willett, Payne Oil & Gas Company, Susannah Smith, Little & Willett Oil & Gas Company:

You and each of you are hereby notified that the undersigned owns a prior lease upon the following-described real estate situated in the County of Crawford, State of Illinois, to-wit:—

The S. E. of the N. E. Section 2 Township 8 Range 14 containing 40 acres and the North half of the N. E. of S. E. of Section 2 Township 8 Range 14 containing 20 acres and part of the N. W. of the N. E. of Section 11 Township 8 Range 14 containing 30 acres, of Crawford County, Illinois, by virtue of a certain lease dated 89 22d May, A. D. 1905, on said premises executed by Susannah Smith to M. A. Walton, and by him assigned to R. L. Prosser, and by the said R. L. Prosser assigned to the undersigned, E. N. Gillespie, who has complied with all the terms and conditions of said lease to the said M. A. Walton, and you and each of you are hereby notified to keep off the said premises for the purpose of drilling thereon for oil or gas as the undersigned has a legal lease on the same for oil or gas and intends to and will carry the same out fully by the terms of the said lease.

Dated at Robinson, Illinois, this 8th day of March, A. D. 1907.

(Signed)

E. N. GILLESPIE,

For GUFFEY, GILLESPIE & PITCAIRN.

STATE OF ILLINOIS,

Crawford County, ss:

I, R. L. Prosser, being duly sworn, says that he has served the above and foregoing notice on Susannah Smith and — King on the said Susannah Smith on the 9th day of March, 1907, and on — King on the 14th day of March, 1907, by reading the same to them and each of them, and by delivering a copy, thereof, on the day of reading the same.

R. L. PROSSER.

Subscribed and sworn to before me, this 16th day of March, 1907.

[SEAL.]

G. V. PARKER,
Notary Public.

Exhibit 9—Postal Card.

Carded for complimentary offered in evidence a postal card, Exhibit 9, which said Exhibit is in the words and figures following, to-wit:

Registry Return Receipt.

Received from the Postmaster at Buffalo, N. Y., registered letter No. 579, from Robinson, Ill., addressed to Little & Willet, Dec 4/17, 1905.

LITTLE & WILLET.

(On the reverse side appears:)

Buffalo, N. Y., Dec 1, 6:30 p. m.

Return to R. L. Freeman, Box 335, Postoffice at Robinson, Ill.

Q. What effort, if any, did you make to obtain the names or names of persons claiming to own an interest here?

A. I don't just comprehend that question.

Q. What is it?

A. I don't know as I understand.

Q. Did you make any effort to find out the persons who claimed under this lease, the house on there and operating the premises?

A. Well, I was one of them, Little & Willet.

Q. Well did you find Little & Willet?

A. No, sir.

Q. What effort did you make to find them?

A. I went to Cairo to find them, and Mr. Johnson of Johnson & Salley—Salley & Johnson told me that they had left for New York and gave me their address.

Q. And you have stated what you did in pursuance of that. Now, did you have any talk with Salley or Johnson?

A. I talked with Mr. Johnson.

Q. Who do you mean by Mr. Johnson?

A. Mr. Charles Johnson.

Q. Is he one of the defendants in this case?

A. I believe so, yes sir.

Q. Now, give that conversation.

A. Well the conversation Mr. Johnson and I had was he told me he was about to purchase some property in the neighborhood of Mt. Cox, Crawford County, Illinois, and I inferred that he would need the Smith house and asked Mr. Johnson at the time if that involved the Smith house and he said it did, and I told him that Mr. Willet had a prior lease, and would insist on his rights there, and he said he did not know anything about that. I believe that is the conversation.

Q. At that time did Johnson say whether or not he had purchased the house?

A. He had not purchased them from the conversation at that time; he was about to purchase them; and he was sporting on those leases.

Q. What scenes was that conversation?
A. What I was in the waiting room of the attachment office at
Lansing.

Q. Illinois?

A. From Illinois.

Q. Are you from office I was?

A. I was in at about March 15, 1907.

Q. Was there any other discussion about this matter I at
that time between you and Simpson?

A. Nothing further, I believe, than I have related.

Q. What did he say after he was talking of purchasing land? I
don't know you said that?

A. What he was talking of purchasing of land of White & Knight
I don't know.

Q. What time was you and Mr. Simpson speaking?

A. The same I think and I cannot think now.

Mr. Lewis: You may ask him.

Re-examination by Mr. Hamilton:

Q. You had a conversation in Chicago Illinois, with Mr. Simpson,
one of the defendants in this case, was not?

A. Yes, sir.

Q. What time was that conversation?

A. I was in at about March 15th, 1907.

Q. March office?

A. Yes at about March 15, 1907.

Q. What did you discuss in that conversation with Mr. Simpson?

A. What Mr. Simpson was talking me of I don't at any particular
time, nothing up to the matter.

Q. What was said then that the property was for sale?

A. He said he said was for sale about property in the property
and before Hamilton County.

Q. This South property?

A. South, I think, with question being as was indicated to be, I
think, I was the property of land of White.

Q. What was all this question about this was the name of that
South land at that time.

A. I don't.

Q. What was that B. & K. Illinois would it?

A. I cannot tell you he had a name that was it.

Q. What a name was that was all that was that B. & K. Illinois
had another name at that time?

Mr. Lewis: He has no more now than.

Mr. Hamilton: What was that he said then he was asked of.

Mr. Lewis: Why it is a little uncertain whether he had asked
or not asked.

Mr. Hamilton: I don't see any part of the conversation.

Mr. Hamilton: This is part of the conversation.

Examination by Hamilton:

Q. The witness: What is the question.

Q. Did you tell Mr. Johnson in that conversation that Mr. Gillespie had neither drilled a well nor paid the rental nor done anything incumbent upon him under the terms of that lease?

A. Well, I didn't—

Q. Well you knew at that time, in fact, that nothing had been done.

Mr. TROUP: Wait, now, we object to that; that is argument.

The MASTER: Yes, that wouldn't be proper. The question is what the conversation was.

Mr. HINDMAN: Yes, that would be strictly cross-examination, beyond that would not be, I will try to keep within that. I am trying to get what that conversation was.

Q. Did you say anything to him about what Gillespie had done by way of carrying out the terms and conditions of that lease?

A. Well, I had no reason to say anything to him at that time.

Q. Now, I can't hear what you said.

A. I had no reason to have any conversation of that kind with him nor didn't say anything about it.

Q. He didn't ask you anything about it?

A. No sir.

Q. Did you tell him that that lease was still alive?

A. I told him Mr. Gillespie had a prior lease on that and would insist on his rights, and I was there at that time—

Q. Did you tell him what his rights were?

Mr. LOWE: Just a moment. What were you there for?

Mr. HINDMAN: No, I am not asking what you were there for; I am asking for the conversation.

The WITNESS: That is part of the conversation.

Mr. LOWE: Just a moment now, your honor. He told him what he was there for and we want that to get in the record.

Mr. HINDMAN: Well that is what I am after, the whole conversation?

A. Well, I told him I was there for that purpose now to serve notice on Little & Willett.

Q. This is the 15th day of March now that you had this conversation?

A. On or about that date, yes sir.

Q. Johnson told you at that time that he and Solley were going to buy of Little & Willett?

23 A. Yes, sir.

Q. That is right, is it?

A. They were figuring on it, yes sir.

Q. And you knew a few days after that that they did buy it?

A. I knew afterward they did, yes sir.

Q. Yes. Did you serve any notice on them after you knew they had bought it?

A. I did not, no sir.

Q. Why didn't you?

Mr. LOWE: Well, to that we object, your Honor; argumentative.

The MASTER: Well, he has not stated how long afterward he learned it. I don't know if that is material; it isn't cross-examination.

Mr. HINDMAN: Perhaps not cross-examination, that is all.

Redirect examination by Mr. LOWE:

Q. I don't know whether you testified or not—Had Mr. Gillespie paid rental at that time? Counsel said you knew it hadn't been done.

A. Rentals on which,—on the Smith leases?

Q. Yes.

A. Yes, sir; he had.

Mr. LOWE: That is all.

Recross-examination by Mr. HINDMAN:

Q. How do you know?

A. Well I was in the office and I knew when they sent the checks to the bank at Martinsville.

Q. You was an officer?

A. I was in his office and knew at the time when they sent checks to the Bank at Martinsville.

Q. When did he send any checks to the Bank at Martinsville?

A. I could give *give* you the dates.

Q. Then you are not giving any dates now. Do you know it was before this time?

A. Well, I had reason to know because I was paying some rents myself, but not these particular ones, but along when rentals were paid at different places.

94 Q. Then you say that at the time of this conversation you can't fix the date, the conversation you had with Johnson was after the money had been deposited the Martinsville Bank as land rental on this lease; is that right?

A. Yes, sir; that is right.

Q. Well, you don't have to guess at it, this is an important thing in this case and I want you to be sure about it. Can you state positively?

A. Yes, sir; that had been paid in money.

Q. I can't hear very well.

A. At this date you refer to March 1, 1907.

Q. At the time you are fixing the date you didn't know anything about it—at the time you had the conversation with Johnson about which you have testified, that conversation occurred after the money had been deposited in the Martinsville bank in payment of the land rental on these Smith leases?

A. Yes, sir.

Mr. HINDMAN: That is all.

Mr. SIMMONS: On behalf of Little & Willett I desire to ask a few questions.

Mr. SIMMONS:

Q. Who were you representing on the 15th day of March, 1907, when you was talking to Mr. Johnson?

A. E. N. Gillespie.

Q. E. N. Gillespie. And you told Mr. Johnson that Mr. Gillespie had a prior lease on these Smith lands, that he was going to enforce, is that right?

A. Told him he was going to insist on his rights there.

Q. Insist on his rights?

A. Yes, sir.

Q. How long had you been representing Mr. Gillespie in that field?

A. From the 1st day of August, 1905.

Q. You had never had a talk with Mr. Little or Willett up to that time about the Smith lease?

A. Never saw Mr. Little, no.

Q. And you had been there in the field all the time, representing Gillespie, hadn't you?

A. I was not in the field all the time, no sir.

Q. Oh, well, in Illinois, there representing them all that time as their agent, wasn't you?

A. Partially, yes sir.

Q. Yes, sir. Now at that time when you talked to Johnson how many wells had Little & Willett drilled on these Smith leases?

A. I couldn't answer that question.

Q. How?

A. I couldn't answer that.

Q. Well, you knew they had drilled on it, didn't you, at that time?

A. I knew they had drilled a well on James A. Smith.

Q. Yes, sir. And you knew that Gillespie had never done anything on those leases at that time, didn't you? Oh, answer!

A. Hadn't done anything—nothing in the way of operating, no.

Q. That is what I am talking about. Now, how long had it been before that when you had learned that Little & Willetts had drilled on those leases before that 15th day of March?

A. Why, that was along about the 1st of February, along in February.

Q. Now, to refresh your recollection don't you know that Little & Willetts had drilled a well on those Smith leases as early as October, 1906?

A. I do now, but I didn't then.

Q. Well, then, when did you first learn it?

A. I didn't then.

Q. That they had drilled—in February, you say?

A. I answered that question, I believe.

Q. Well, how many wells did you learn in February they had drilled on the Smith leases?

A. One.

Q. How?

A. One.

Q. How many wells did you know on the 15th day of March, 1907, that Little & Willets had drilled on this Smith lease?

A. I knew there had been one.

Q. Did you know whether there had been any more?

A. No, sir.

Q. And you knew that it was a large producer then, didn't you?

A. I knew it was a gas well.

Q. How?

A. I knew it was a gas well.

Q. Had you ever seen it?

A. Yes, sir.

Q. How?

A. Yes, sir.

Q. Well, when?

A. Well I seen it on the 8th day of March, 1907.

Q. Was the 8th day of March, 1907, the first time you ever saw it?

A. Yes, sir; the 8th or 9th, I will not fix it for certain, the 8th or 9th.

Q. Was you on the Smith leases on the 8th day of March?

A. It was the 9th, I believe.

Q. The 9th day of March. Well now, don't you know that they were also drilling a well on the Smith leases on the 8th of March?

A. I knew they was not?

Q. How?

A. I knew they was not.

Q. You did. Were you on both leases?

A. Yes, sir.

Q. Well you had never—you had that knowledge from February up to March and had you ever gone on the leases during that time?

A. I had no occasion to go—

Q. Oh, no, did you go?

A. No.

Q. Well, that is what I want to know. And you never did until the 15th—until March, the 15th day of March, 1907, make any effort to find Little & Willets, did you?

A. Yes, I tried to find them on the 9th.

Q. Well, then, you never did until the 9th of March?

A. No, sir; I did not.

Q. And yet you knew they were in possession of those leases all the time?

A. I did from in February.

Q. Yes, sir. And you never had undertaken to find anybody that was in possession of those leases until the 9th of March after the well was completed and after you knew it was completed?

A. Not in the way of serving notice on them, I didn't.

Mr. SIMMONS: That is all I care to ask.

Mr. HINDMAN:

Q. Was the 9th day of March the first you was on these Smith premises after the lease to Allison?

A. Yes, sir; it was.

97 Q. That was the first. On the 9th of March you was there what developments did you observe being made there?

A. I observed a gas well on the James A. Smith farm.

Q. Anything else?

A. No, sir.

Q. See a powerhouse there?

A. No, sir.

Q. Didn't you see drilling a well on Mrs. Johnson, a standard rig—Mrs. Smith, I mean?

A. No, sir.

Q. Didn't you see that? What did you go out there for?

A. Went out there to serve a notice on Little & Willetts and Smiths.

Q. Well, you was on the property, did you observe any tanks there?

A. No, I did not.

Q. No tanks, and only one well; is that right?

A. Yes, I answered it.

Q. How does it come if you knew that Gillespie was claiming to have a lease on the premises and you were his agent in that community that you made no objection until after a producing well was brought in?

Mr. LOWE: We object, your Honor.

The MASTER: Oh, he may answer.

Exception by complainants.

A. I was not looking after the producing end of it. It was not part of my business to look after it.

Q. Was that your reason?

A. I had no other reason to go up there.

Q. Well, you was not looking after the producing end when you went around hunting up somebody on whom to serve a notice after a producing well had been brought in, were you?

A. I did that at the instance of Mr. Gillespie.

Q. Yes, Well, you was acting for the same man, Gillespie before these people had brought in the well weren't you?

A. Yes, sir.

Q. In his employ?

A. Yes, sir.

Q. Looking after his interests in that same community?

A. Trying to.

98 Q. Then can you explain to the court why it was—
A. I will modify that—

Q. Just wait, why it was that you remained quiet and dormant and asserted no right, or interest, or claim in the premises until after the result of the development was known?

A. I was not looking after his end of the interests in the territory at that time.

Q. How does it come you commenced to look after those interests as soon as developments disclosed the fact that there was oil there?

Mr. LOWE: Now, your Honor, I object to that question. I think the question is improper.

The MASTER: Well, I understood the witness to say that he learned there was a gas well there in February.

Mr. HINDMAN: He said he learned it on the 9th of August.

The MASTER: February.

Mr. HINDMAN: He learned now that it was completed in February.

The WITNESS: I think you misunderstood me. I didn't say I learned that was a gas well then, but I learned that Little & Willett had—some other parties had the lease.

The MASTER: Well, if the question assumes something that he did not testify to, why, it would not be proper.

Mr. HINDMAN: Let's see whether it does or not.

Q. When did you first learn that there was any development on the premises out there?

A. On the 9th of March I saw a gas well there.

Q. That is when you first learned it, was it?

A. That is when I first saw it.

Q. Yes. And then on the 15th you served notices, is that right?

A. I served a notice on the 9th.

Q. You served a notice on the 9th?

A. Yes, sir.

Q. As soon as you found out that the wells that had been drilled there resulted in the finding of oil you served notices, is that right?

Mr. LOWE: Now, your Honor, I object to that.

The MASTER: Well he is asking him if that is what he did.

Mr. HINDMAN: That is exactly what I am asking.

Exception by complainants.

Q. That is right, is it?

99 A. I found out there was parties that had leases, but I don't recollect—there was no producing well there at that time.

Q. Wasn't there a producing well there on the 9th of March?

A. There was a gas well there.

Q. No oil?

A. I didn't see any.

Q. Well, did you look for any?

A. I certainly did.

Q. And you didn't see any oil tank there?

A. Not on that farm.

Q. Did you on the other farm, the other Smith farm?

A. I did on the Elzora Smith farm.

Q. Yes. And didn't you on the James Smith?

A. No, sir.

Q. The land that is in controversy in this action?

A. No, sir.

Q. Wasn't there a power house on the Susannah Smith farm, then?

A. I didn't see any.

Mr. HINDMAN: Didn't see any? That is all.

Redirect examination by Mr. LOWE:

Q. Was this lease recorded as soon as it was given, the lease to Allison that Little & Willetts and Hennig claim?

A. I think not.

Q. When was it recorded?

A. Why, I don't believe—

Mr. HINDMAN: Now, wait; the record would be the best evidence.

The MASTER: Which lease do you have reference to?

Mr. LOWE: The Allison lease.

The MASTER: Well, that is admitted in the answer. There is no need of proving that; it is admitted it was entered of record in Book 8, page 437, and your bill states it was on the first day of April, 1907, and sets forth it was in Book 8.

Mr. HINDMAN: Go ahead; there is no objection.

Q. When was it recorded, Mr. Prosser, have you examined?

A. Well, I think it was recorded January 28th, but then I don't know; I can't give that just merely from my own memory.

100 Q. Did you ever look at the records?

A. I looked the records up but I couldn't say positively. I think that was the date from my own—

Q. Yes. How long had you known of the production of a gas well on the James A. Smith land before you served the notice?

A. I didn't know there was a well there, I don't think until I went out there on the 9th day of March.

Q. You say that the tanks that were there were on the Elzora Smith land?

A. There were some tanks there on the Elzora Smith farm.

Q. But that is not included in the land in this suit?

A. No, sir.

Q. And Mr. Gillespie did not claim any rights there on the Elzora Smith land?

A. No, sir.

Mr. LOWE: That is all.

Recross-examination by Mr. HINDMAN:

Q. Do you desire the court to understand you as saying that you did not know that any wells had been put on the premises described in the Walton lease until the 9th of May, 1907?

Mr. LOWE: Now, just a moment—

Q. The 9th of March. I am referring now to the wells on the Walton premises, covered by the Walton lease.

Mr. LOWE: Now, your Honor, we object to it, because of this fact. As I stated to the court a while ago—Now, Mr. Hindman, you are confining yourself to the land in controversy, are you not?

Mr. HINDMAN: I am confining myself to the land covered by the Walton leases.

The MASTER: The lands in controversy?

Mr. HINDMAN: No. Here is the point: We will contend that these people were not acting in good faith, but they were waiting for somebody to make developments. If the money that was expended in labor showed any oil they would sit by and wait until that occurred, and if after the money had been expended and development made and it showed oil then they could step in and claim to have a lease. We desire to show they were not acting in good faith.

101 The MASTER: In other words, you want to show that this Elzora Smith land was part of the Walton lease?

Mr. HINDMAN: I understand that that was not covered by the Walton leases.

The MASTER: Of course, he can ask the question in his own way. He is asking this witness about the leases owned by Walton.

Mr. HINDMAN: The Walton leases in controversy in this case.

The MASTER: Well on these Smith lands?

Mr. HINDMAN: On the Smith lands.

The MASTER: Well he may answer that question.

Exception by complainants.

(Question read.)

A. That is when I saw the gas well on the James A. Smith.

Mr. HINDMAN: Will you please answer the question? Read it again.

(Question read.)

A. I knew there had been a dry hole drilled on the Susannah Smith farm.

Q. And when the dry hole was drilled you did not serve any notice on anybody that was claiming any interest in the premises, did you?

A. No, I did not.

Q. No, no.

A. I don't remember when that was that I found out when they brought in that dry hole.

Q. I will ask you if the dry hole was not brought in in June 1906.

A. I know so now, but I didn't then.

Q. Didn't know it in 1906?

A. No, sir.

Q. Didn't know it before the 9th of March, 1907?

A. Well I couldn't answer that question; I didn't—

Q. Well that is what I want to get at, when you first learned of that dry hole.

A. I couldn't fix any time.

Q. Couldn't fix any time. What did you do when you learned of that dry hole.

A. Didn't do anything.

Q. Didn't do anything.

A. I didn't have—

102 Q. You was not asserting any claim in the premises when dry holes had been brought in there, were you?

A. I was not looking after that part—

Q. No, you wasn't looking after that part, but just as soon as a producing well was brought in then you were looking after that part; is that what you want to say?

A. As soon as we understood that there was another lease given on the property to Allison covering Mr. Gillespie's lease I—

Q. But you knew that Wilcox had a lease covering this same ground and had drilled in a dry hole the year before?

A. No.

Q. And abandoned?

A. I did not.

Q. You did not know it? Didn't you know that Wilcox had a lease on this Smith land the same land covered by this Walton lease in 1906?

A. I found it out in February 1907, when I was looking up the records.

Q. In February 1907, but didn't you know that Wilcox had put down a dry hole?

A. I was never up in that country until March, 1906.

Q. You don't understand me as asking you if you was up in that country, do you? Read the question.

(Question read.)

A. I had no personal knowledge of it at the time.

Q. You had no information to that effect?

A. Well I couldn't answer whether I did or did not.

Q. Do you desire this court to understand you as saying that you had no information in 1906 that Wilcox owned a lease on the same premises? And had put down a nonproducing well commonly known as a dry hole?

A. Well I am not trying to evade the question.

Q. Well, tell the truth about it.

Mr. LOWE: Well your Honor, I submit he is telling the truth.

The MASTER: Well we will assume he is telling the truth. The question is, whether you had that knowledge?

A. Well, I had no personal knowledge.

Q. I am not asking you about any personal knowledge. Didn't you have any information to that effect?

A. I could not answer that question.

Q. Why couldn't you answer it?

103 A. I don't remember.

Q. You don't remember?

A. No.

Q. I will ask you if it was not a matter of common knowledge and comment that the Wilcox well there stood seven or eight months—was blowing gas and water out there for seven or eight months?

A. Mr. Hennig may have known it; he was up in that county; I didn't.

Q. Didn't you know that to be a fact?

A. I did not.

Q. You saw it on the 9th day of March, didn't you?

A. I saw the James A. Smith well on the 9th day of March.

Q. Didn't you see the Wilcox well, also?

A. No, sir.

Q. Didn't you know there had been a Wilcox well completed on the premises?

A. I never saw the well.

Q. Under a different lease?

A. Never saw it.

Q. And that it had been abandoned and the lease surrendered and the rig left standing there, didn't you know anything of that?

A. I knowed of it afterward.

Q. Didn't you then?

A. Not until that time.

Q. What time do you refer to?

A. The 9th of March.

Q. The 9th of March. You did know it then?

A. Yes, though I wasn't up to Mrs. Smith's then.

Q. But you had not heard of the Wilcox well up until that time?

A. Not to the best of my knowledge. I am not just making that positive.

Mr. HINDMAN: No; that is all.

Recess till 1:30 p. m.

104 Mr. R. L. PROSSER, being recalled, was further cross-examined by Mr. Hindman, and testified as follows:

Q. Mr. Prosser, you have testified that you was looking after Mr. Gillespie's interest in the Illinois Oil Field. Mr. Gillespie did not live in Illinois at that time?

A. I testified I was in the leasing department for Mr. Gillespie.

Q. But Mr. Gillespie was not in that section of the country himself, was he?

A. I think he was, yes sir.

Q. Oh, he was! Where did he live?

A. Well, his home is in Freeport, Pennsylvania.

Q. Yes, where did he stay, where did he make his headquarters?

A. Robinson.

Q. At Robinson. How far is this land from Robinson?

A. Nineteen or twenty miles.

Q. And where did you make your headquarters?

A. Well, I couldn't tell you any particular place; I worked in Illinois, Indiana and Kentucky.

Q. Well but you was looking after Mr. Gillespie's interests down here in Illinois?

A. Of course, looking after his interest.

Q. You was looking after his leases?

A. Not exclusively.

Q. You was doing something for him at any rate.

A. Yes.

Q. Well, where were you making your headquarters in the Illinois field?

A. Sometimes at Robinson and sometimes at Martinsville, Illinois.

Q. And this land was between Robinson and Martinsville, wasn't it, south of Martinsville and north of Robinson?

A. Southwest of Martinsville and northwest of Robinson.

Q. Yes. Now, you said something about the well coming in on the Elzora Smith land. When was it that that well came in?

Mr. LOWE: Well, your Honor, I object. I don't think he testified about any well on the Elzora Smith land. It was a power house.

Mr. HINDMAN: Oh, yes.

105 The MASTER: I think he said there was a well on the Elzora Smith farm.

Q. Yes, when was that—it was for the purpose of fixing date.

A. I said I saw that well when I was up there the 9th of March 1907.

Q. Well, was that the first that you had any knowledge of that?

A. Yes, sir.

Q. I will ask you if it was not true that you was watching the development in that section of the country, for the purpose of determining the value of the leases that you had in charge?

A. No, sir; that was not my business; Mr. Gillespie was then looking after that himself.

Q. Isn't it true that being in the leasing business in order to determine where you want to take leases, and what you would give for leases, what bonus, and so on, that you would have to be acquainted with the development in that region?

A. It might be necessary in some regions.

Q. Well, isn't that true, you wouldn't go in a community and take up leases without knowing something about the development?

A. Yes, sir.

Q. And after you took up a lease in a community you would watch the development that would tend to throw any light on the prospects of that lease, wouldn't you?

A. Not always.

Q. Well isn't that your business, and didn't you do that?

A. Not altogether, no.

Q. Not altogether. Well, then, did you in part?

A. If I knew of any developments I reported them sometimes.

Q. Yes. Isn't it true that every man that has a lease including yourself watches the development in that—tending in that direction?

tion so as to determine the probability of oil under the premises he has leased.

Mr. TROUP: Now, if the court please, I object to that; that is not cross-examination at all of this witness.

The MASTER: I don't believe that is cross-examination.

Mr. HINDMAN: Well, this is the point. He claims absolute ignorance as to the wells that came in, and yet he was the one that had charge of these leases in that community. I want to show—

106 Mr. LOWE: Well, now, we want you to prove that Mr. Hindman, rather than make the assertion.

Mr. HINDMAN: Prove what?

Mr. LOWE: Prove that he was in charge of the leases.

Mr. HINDMAN: Well that is what he said, that he had charge of the leasing department.

Mr. LOWE: Not of this territory up here, however.

Mr. HINDMAN: Well, I supposed he would split it up and cut this territory out for convenience.

Q. Isn't it true you had charge of these leases here?

A. No, sir; I didn't have charge.

Q. Why you took them in your name, didn't you?

A. What leases?

Q. Now, what leases do you suppose we are talking about?

A. I didn't take any leases in my name.

Q. Didn't take any leases in your name?

A. No, sir.

Q. Aren't you the man that testified here upon the very chair that you are sitting on now that you took the leases in your name?

A. No, sir.

Q. And that you identified the signatures as your signatures and assigned them?

Mr. TROUP: That is the assignment.

Mr. LOWE: Yes, you stick to the leases, that is what you want to hold the witness to.

Q. Aren't you the same man, R. L. Prosser, who identified the signature on these leases?

A. I didn't take the leases.

Q. But you bought them, Didn't you?

A. I purchased this lease of Mr. Walton, yes, sir.

Q. Well, I didn't ask you about the agent part of it, but did you take them as the agent of Mr. Gillespie?

A. I bought them for Mr. Gillespie.

Q. Yes, because you was in charge of Mr. Gillespie's leasing department?

A. No sir; I was in charge of it.

Q. Well, didn't you have something to do with Mr. Gillespie's leasing department?

A. I was under his instructions.

Q. Yes, of course, you was under his instructions when you was

acting for him in any capacity. Then it is true that you had charge of the leasing department of the Illinois team and especially these particular leases is controversy in the case, isn't that true?

A. No, sir.

Q. You took them yourself at the solicitation of Mr. Gillogh, didn't you?

A. I purchased them from Mr. Walton.

Q. Yes, but wasn't that from Mr. Gillogh—you assigned them to Mr. Gillogh?

A. Yes, sir.

Q. And you say you paid no attention to the development in that community to favor either or not have you say at all in the following terms or even any development on those farms, is that right?

A. I was not there all the time; I couldn't—

Q. Oh, no, not all the time. What time was it that you was there?

A. I was there the 30th day of March, 1907.

Q. That is the only time?

A. That is the first time.

Q. Where were you all the rest of the time, now?

A. I couldn't just exactly tell you where I was at a particular time. I was in Kentucky and Indiana part of the time.

Q. But you was there in that vicinity on the 30th day of March, that is right, is it?

A. No, sir, that is not right; I was in the vicinity—

Q. Then tell us what is right?

A. I was there in February.

Q. Where were you from February until March?

A. I was in Cherokee County.

Q. In Cherokee County; then you was there more than the 30th of March. Where were you in January?

A. I think I was in Hamilton County probably in January.

Q. In where?

A. In Hamilton County, Illinois.

Q. In Illinois?

A. I think so.

Q. And where were you in December?

A. I couldn't tell you.

Q. Don't know?

A. I might look it up and tell you after while, but I couldn't just at the present time.

Q. And you didn't even leave off the well on the Illinois South land until the 30th day of March?

A. No, sir.

Mr. Foreman: That is all.

Indirect examination by Mr. Long.

Q. At the time you purchased those two leases from Mr. Walton was there any developed territory in the neighborhood?

A. No, sir.

5. These have the ending *-en*, with *-en* being the
 6. These are ending in *-en*, so
 7. How do you know it's a verb? (It's a verb)

A. Couldn't have been a greater number.

Q. What?

A. Couldn't have been a greater number.

Q. Why, you were up right on this farm within ten rods of wells and tanks and tank-houses, and didn't see them, wern't you?

Mr. TROUP: Now wait; I object to that as argumentative and not cross-examination.

The MASTER: Oh, he is just getting his general information about——

The WITNESS: The best of my recollection——

Q. Do you say you were acquainted then with the developments enough to state to this court as to where the development was and where the wells were?

A. I said to the best of my knowledge, I didn't think——

Q. Well you had knowledge, didn't you, and knew exactly where the wells were, didn't you?

A. There was not much drilling at that time south of the Vandalia railroad.

Q. How do you know?

A. I knew from the knowledge I gained by being over the——

Q. Certainly, and you kept close tab and gained all
110 knowledge of the wells and you knew it, didn't you?

A. No, sir.

Mr. HINDMAN: That is all.

Testimony of J. R. Penn.

Mr. JOHN R. PENN, a witness called on behalf of the complainants, being first duly sworn, was examined in chief by Mr. Lowe, and testified as follows:

Q. What is your name, age, occupation, and place of residence?

A. John R. Penn; age 33; residence, Marshall, Illinois; superintendent of the leasehold department of the Ohio Oil Company.

Q. As superintendent of the leasehold department of the Ohio Oil Company, what are your duties, Mr. Penn?

A. The acquiring of leases and property.

Q. How long experience have you had in that business?

A. About eight years.

Q. And are you familiar with the terms and provisions and conditions of the ordinary oil leases in the State of Illinois?

A. Yes, sir.

Q. Are you familiar with what is generally called the surrender clause?

A. Yes.

Q. I will ask you if that is usually and generally in an oil and gas lease taken in Illinois oil fields?

Mr. HINDMAN: We object to that.

The MASTER: The objection will be sustained. I can't see what usually is in a contract has to do with this particular contract.

Mr. LOWE: Well, we will follow that up, we hope to at least, other matter.

The MASTER: Well, but the surrender clause is in these contracts.

Mr. LOWE: Yes, sir; and we want to show that it is usual to put it in in an Illinois lease; it is the custom of the oil people generally to do that.

The MASTER: I know, but what light does that throw on this?

Mr. LOWE: We hope to follow it up with other matters that the court will see what light it would throw on it show that it was necessary to have it in an oil lease.

The MASTER: Well, the objection will be sustained.

Mr. YOUNG: Counsel offer to show by the witness on the stand other competent witnesses to follow, that the provisions in the leases under which they claim, which reads as follows:

Offered Provisions Contained in Leases.

Upon the payment of One Dollar at any time by the party of the second part, heirs, successors, or assigns, to the party of the first part, heirs, successors or assigns, said party of the second part, heirs, successors or assigns, shall have the right to surrender this lease for cancellation after which all payments or liabilities thereon to accrue under and by virtue of its terms shall cease and determine, and this lease become absolutely null and void."

Commonly called a surrender clause, is a customary provision in the oil and gas leases outstanding in this state and in all other states of the Union where oil and gas are produced.

That the conditions and exigencies of the business of exploring new territory for oil and gas which make necessary such a provision are as follows:

(a) The existence of oil pools can only be ascertained by drilling. The number of wells required to test the existence of a field, or its extent, varies greatly. The fact that one well produces oil gives indication as to the extent of the pool or field. The limits can only be ascertained by continued drilling.

(b) The expense so involved is large, and of course is borne by the operator; the landlord invariably receiving a share of the proceeds and being in no way liable for any part of the expense or loss if a territory proved unproductive.

(c) Wells usually are drilled in most territory during only part of the year, owing to the difficulty in hauling when the roads are in bad condition. This is especially true in cases where the territory being drilled is a considerable distance from railroads, and the fact usually is that oil fields are distant from railroads.

It is impracticable, at least from a business standpoint, to drill a large number of wells at the same time in exploring new territory. The custom is to drill wells, not merely for the development of the territory, but to indicate the extent and direction of the field. To drill a large number of wells at one time, without regard to the

112 previous ascertainment of whether the territory be productive territory, would involve great expense, and in many cases unnecessary loss.

(d) There is no business in which so large a loss is sustained in actual practice as is the case in the loss involved in the search for oil fields or territory, due to the drilling of dry holes and the payment of rentals upon territory proving unproductive, and the other necessary expenses connected therewith.

(e) In view of these facts, before an operator can afford to engage in testing or exploring for oil territory, it is essential that he secure a large block of leases covering many acres, so that in the event of finding oil he will have a sufficient territory reasonably to assure him a profit from the business ultimately.

(f) It has become the uniform practice in all oil fields, in making leases whereby the leases acquires the right to explose for oil, and to hold the territory for the term of the lease to provide for the payment of a rental, which is eventually fixed at a certain sum per acre. In this field all leases provided for a payment of this kind, but the payment of such rentals necessarily involves a large amount of money, and if the operator be required to pay these rentals after he has tested the territory and found it to be non-producing territory, he is involved in very large additional expense and renders it useless for him to go forward.

For this reason, it is invariably the custom to insert in oil and gas leases, a provision whereby the operator is enabled, having made such test, to surrender the lease and relieve himself from further liability to pay rentals.

In the actual practice of the business, under this clause large amounts of territory are annually surrendered, the explorations having indicated that the territory is not oil producing territory.

Unless the business can be conducted under conditions of this kind, it would be impracticable to get solvent and responsible men to engage in the business, for otherwise the risks would be so great that no prudent man could engage therein.

The MASTER: Now, just one minute. Do you contend that all that matter is involved in the question put to the witness?

Mr. YOUNG: We make that offer of that testimony.

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Colloquy of Master and Counsel.

The MASTER: I know, but you couldn't prove all that in response to the question put.

Mr. YOUNG: That is simply an outline of what we propose to prove. We will follow that up and show the facts that I have outlined in my offer.

The MASTER: Well, but part of that may be competent and part may not. The question asked of this witness was what the custom was with reference to the use of the surrender clause in an oil lease. But then if you have got any authority on that proposition, why, of course, I will listen to it. The use or meaning of the surrender clause is well defined by the court.

Mr. YOUNG: Yes, but our position is simply this. Of course you now the question of whether we were entitled to relief in this case raised by demurrer; our bills were demurred to, among other grounds, because of the appearance of the surrender clause in our leases. Now, that demurrer was dissolved, and the question as a purely legal one was disposed of by the court. We are here in a court of equity asking specific relief from a court of equity. It has been decided by the Supreme Court of this state in the case of *Grey v. Keith* that a court of equity may not grant relief to the lessee out of possession simply on the ground of want of mutuality of contract. Now, our position here is as far as the merits are concerned, is to show that this surrender clause is universally and customarily found in oil and gas leases; that its existence is required by the interests and exigencies of the business, especially in the development of wild-cat territory. Now, I have outlined to you some reasons and we expect to produce evidence here in support of our offer showing those facts and the question for you to decide it seems to me, is whether that testimony is competent and relevant to the issues in this case. Now, our position is that it is competent and is relevant because whether the Federal courts will grant us the relief that we ask for here depends not only on whether we have a valid and subsisting contract—and that question has been determined in this state by the Supreme Court of this State, and in fixing a rule of property, will be followed in this case—be followed by the Federal Courts; but the Federal courts will not follow the decision of the State courts in reference to the remedy applicable to a valid and subsisting contract. And we propose to show here that we have this surrender clause, that it is necessary, that it is customary and almost universally practiced in oil and gas leases, and that it is a necessity arising from the exigencies and conditions under which the speculating or exploring for oil and gas is carried on.

The MASTER: Well, I understand the purpose of the evidence, but the only question before me now is whether it is proper to show whether this clause is customarily in a lease. That is the only question that I have to decide and I don't decide that finally, if you have got any authority to the contrary.

Mr. SIMMONS: That is a legal question and not a question of fact.

The MASTER: Of course, as to the competency of this other evidence, I will not pass on that until you offer it.

Mr. YOUNG: Well, will you admit the testimony excepting the part relating to the question whether or not this is the customary provision in an oil and gas lease?

The MASTER: Well, of course, I will not bind myself in advance as to whether I will or not.

Mr. YOUNG: No objection has been made to this offer.

Mr. HINDMAN: There was an objection to the question.

Mr. SIMMONS: We are objecting to the offer, too.

The MASTER: Of course now I will say this, Mr. Young, that there is part of the matter in your offer that I think would be competent to prove. The only thing I have to pass on now is the ques-

tion of whether or not this provision is usually in an oil lease, and that is on the ground that each law suit must rest on its own contract. You have got to rest here on what is in your contract. Of course, we can only pass on this one at a time and so far as evidence as to this provision *unusually* being in a contract, unless you have some authority to the contrary, the objection will be sustained.

Mr. DODDS: It has been asked of the complainants what they expect to prove and the complainants make the offer and that offer is not objected to by the defendants. We think that the defendant ought to put an objection upon the record.

Mr. HINDMAN: We don't propose to object to questions not asked. We will object to the questions as they come.

Mr. SIMMONS: We object to the offer for all the reasons that are made in the objection to the question, and for the further reason that there are many things contained in the offer not responsive to the question.

The MASTER: As far as the offer is concerned, I will say 115 this, that there are many parts of that that I think are proper and can be shown under your theory of the case; but there are many of them that perhaps are not proper. I don't see how you can raise them under this one question; because the law gives a legal effect to this clause in a lease and we know of course how the courts have construed it.

Mr. LOWE: There is an objection by Mr. Simmons to the offer as a whole.

The MASTER: Well, now, I have tried to indicate — you gentlemen three or four times that the facts now existing in oil territory which make it necessary or unnecessary to have certain clauses in the lease, so far as I am advised now, is competent evidence.

Mr. LOWE: But it seems competent for the complainant to have a ruling on this particular offer.

The MASTER: Well, but part of it may be competent and part of it may be incompetent. I can't retain in my mind what you have read off from three or four typewritten pages.

Mr. LOWE: But it is conceded by counsel that if any part of it is improper, the whole offer is improper.

The MASTER: Well, I can decide this if you want me to. The offer is made by counsel and objected to by defendants. The objection to the offer, made by counsel for defendants will be sustained for the reason that the offer is in part improper and incompetent evidence and for the reason that the offer is in part a mere argument. However, the Master will hold that he will admit evidence along the lines as indicated in Divisions A, B and C of the offer, as well as those parts which contain statements of facts which existed in the oil field in question and which determined or governed the reasons of the insertion of the surrender clause in the lease in question.

To which ruling of the Master, the complainants then and there duly excepted, and also to which ruling, the defendants then and there duly excepted.

Testimony of J. R. Penn.

Q. In your duties of leasing, had you observed the development of the leases, Mr. Penn?

A. Yes, sir.

Q. To what extent?

A. To the extent of watching very carefully all wells that are drilled on leases that we hold and in localities in which we hold leases to determine our policy as to acquiring other leases or surrendering the leases that we may have.

Q. What is that territory called in oil field before development?

A. Well, the common term is undeveloped territory or wild-cat territory.

Q. How are the existence of oil pools in wildcat territory or undeveloped territory ascertained?

A. By drilling, putting down wells.

Q. I will inquire if the surface indicates anything at all as to whether or not oil is present?

A. It does not.

Q. Is there any rule as to the number of wells it takes to develop territory?

A. No, there is no definite rule as to a definite number.

Q. What indication does the drilling of one well give as to the size of the pool of oil?

A. It does not give any indication whatever as to the area of it except as to that particular spot.

Q. How can it be ascertained?

A. By following that up with further drilling.

Q. Are you familiar with the expense of drilling oil wells?

A. Yes, sir.

Q. What is that expense in drilling wells,—large or small?

A. Well, in wildcat territory it depends altogether upon the depth of the wells and the number of wells. Wildcatting is usually very costly, though.

Q. Who bears this expense, Mr. Penn?

A. The operator or person drilling the well bears it entirely.

Q. If there is anything of value found there, oil or gas, who gets that product?

A. Under the usual way of operating the owner of the land receives a certain percentage of the oil.

Q. And what is that called?

Mr. HINDMAN: We desire to object for the reason that I suspect it all depends upon the contract.

The MASTER: Well, do you object?

Mr. SIMMONS: We object to that last question.

The MASTER: Well, the objection will be sustained.

Mr. DODDS: Just note upon the record, please, that counsel for complainants, denies the right of the Master to pass upon the com-

petence, relevancy or materiality of the evidence and testimony offered in this case, and exclude them thereof.

117 To which ruling of the Master, the complainants then and there duly excepted.

Q. Is the owner of the land or the landlord liable for any expense incurred in drilling?

A. Ordinarily, no sir.

Q. When are the wells usually drilled, in the Illinois oil fields as to the season of the year?

A. Well, the operator- usually try to do most of their drilling in the summer time when the road conditions are at their best for moving material and machinery.

Q. How do you get the material on the ground where the development is to be had?

A. Usually by teams.

Q. What is the nature of the load,—light or heavy?

A. Well, pipe and machinery is very heavy.

Q. And what effect does that have on the roads?

A. It has a tendency to cut them up if very bad, and for that reason they do the greater part of this work when it is possible under good road conditions.

Q. In order to avoid what?

A. The expense of having to haul lighter loads.

Q. In wildcat territory, and by that I mean undeveloped territory, what is the universal rule as to the manner of the lessee or lessees drilling wells, as to number?

A. Well, the number of wells drilled depends of course upon the outcome or result. Usually start in by drilling one well.

Q. Well, I mean as to the commencement of the development?

A. One well is usually drilled and if any favorable conditions it is followed up by other drilling until satisfied it is then a productive area or non-productive area.

Q. And if it is not in a productive area what is done?

A. The leases are cancelled.

Q. What is the purpose of drilling these wells by the owner of the leases, I mean the test well?

A. To determine whether or not there is oil or gas there, if that is what they are seeking for, in paying quantities.

Q. And if he drills more than one its purpose is what?

A. For the purpose of locating it, finding the territory, and producing the product.

Q. What would be the effect as to good business judgment in the oil business to drill several test wells at the commencement or beginning of the development of the territory?

118 A. Well, it might result in its being a very expensive proceeding. It would not be considered good business judgment to do that.

Q. In taking leases in undeveloped territory what is the practice or custom as to area—large or small?

A. Why, it is customary in drilling wildcat territory to get as large an acreage as possible, get a large acreage. This may be so

that the drilling may be followed up so the person doing the drilling will have ample protection.

Q. Protection from what, Mr. Penn?

A. For his work and for the money he is putting in there. If he would drill upon a small piece the others would get the benefit a great deal of the benefit of his work.

Q. When this large area is taken is it for a short or a long term?

Mr. HINDMAN: I presume that would depend upon the lease.

Mr. LOWE: No; I think it would depend upon custom.

Mr. SIMMONS: We desire to object to that question.

The MASTER: Do you mean the lease for a short or a long time?

Mr. LOWE: I mean this, your honor: We are trying to show that before one will develop wildcat territory that he must protect himself so that if he wins or if he gets oil he will have enough to recompense him for the outlay, and if he doesn't take this large acreage other people would come in and take them before he could get them, by paying large bonuses. Now, he cannot develop all of them in a short time, therefore I want to show that it is the custom to take these leases for a definite period, eight or ten years to prevent others getting them and that they may in time be able to develop all their territory. That is my purpose.

The MASTER: Mr. Lowe, do you claim that as a legal proposition that where there is a contract entered into that it is proper to show what they usually do in a contractual relation?

Mr. LOWE: Yes, what the necessity was of making the contract that way. This question is to try to enlighten the court why it is in the lease.

The MASTER: Well, I will give you a chance to pass that up squarely to the court. The objection will be sustained.

Exception by complainants.

119 Q. What is the nature of the development of an area or block of leases in wildcat territory, is it done in a short time, or does it take longer?

A. Well, it takes some time.

Q. And upon what does that time depend, Mr. Penn?

A. Well, it depends upon getting the product taken care of and in going slowly, got to go slowly to get your bearings to locate the oil or gas if fortunate enough to find any.

Q. What do you mean by taking care of the product, Mr. Penn? Just explain that. How is it done?

A. Finding a market for it. Usually done in both oil and gas by means of pipe lines.

Q. As soon as wildcat territory is developed has nature provided a way to transport it, or not?

A. No, sir.

Q. How is that done?

A. It is done by means of pipe lines ordinarily, usually the lines are laid to the field if the field justifies it.

Q. Now, what becomes of the oil after the pipe line gets it,—where does it go?

A. Purchased by——

Q. Well, where does it go?

A. Why, it does to the various——

Q. I don't mean what places, but what kind of places?

A. Well, usually taken to a refinery to refine the crude oil.

Q. Now, then, in the Illinois oil field is the refinery close or far distant from it?

A. Well, there are two or three small refineries now near the field. The greater part of the oil is taken to the Seaboard.

Q. Atlantic or Pacific?

A. Atlantic Seaboard.

Q. From your observation and experience as an oil man in pursuance of the line of evidence you have just testified concerning, in your judgment is or is not what is generally known as the surrender clause a necessity in the operation of an oil and gas lease?

Mr. HINDMAN: Now, we object to that.

The MASTER: Oh, we can give his judgment on that.

Exception by defendant.

A. For the successful carrying on of the business we consider it almost an absolutely necessity.

Q. I will ask you, Mr. Penn, whether or not the surrender clause is used by the operator or owner of the lease?

Mr. SIMMONS: That we object to, your Honor.

The WITNESS: How is that question?

The MASTER: I didn't understand that question.

Mr. SIMMONS: That is purely a legal question.

Q. I mean by that whether or not they surrender under it that is what I am asking. Well, I will put it this way: Does the operator or owner of the lease avail himself frequently of the surrender clause in the lease?

Mr. SIMMONS: To which question the defendants object as being purely a legal question, and the further objection it would be of no consequence what parties to contracts other than this usually do. It would be without the issue.

The MASTER: Well, the objection will be sustained to it; that is the same proposition you had up a while ago.

Exception by complainants.

Q. What would be the effect of the operation of oil territory if these surrender clauses were not put in the leases?

Mr. SIMMONS: We object.

Mr. LOWE: Now, I want to give the court our view. We want to show that if this was not put in there—In the first place, our contention is that this surrender clause is a necessity, and we want to show to the court now that if it is not put in there then oil men would not take the lease and the territory would not be developed. That is what we hope to prove.

Mr. SIMMONS: Well, we want to object to that.

The MASTER: The objection will be sustained.

Exception by complainants.

Q. I will ask you, Mr. Witness, whether or not oil operators will test undeveloped oil territory before they get a large acreage?

Mr. SIMMONS: Just wait a minute, we object to that—well, Mr. Hindman says we will take less time to let it go in.

A. Why, they very seldom drill wildcat wells or test wells unless they have a large block or acreage.

Q. And before they take a large block of acreage what must they have in the lease?

A. Well they must have a chance to let go of it if they don't want it.

Q. And how is that chance made?

A. That chance is made by having a surrender clause in the lease allowing them to cancel it when they deem that the territory is no good.

Mr. LOWE: You may take the witness.

Cross-examination by Mr. HINDMAN:

Q. You have charge of the leasing department of the Ohio Oil Company?

A. Yes, sir.

Q. That is known as the Standard Company?

A. It is the Ohio Oil Company.

Q. Well, it is the same as the Standard?

A. No, it is the Ohio Oil Company.

Q. What is the Standard Oil Company?

A. I don't know.

Q. Never heard of it?

A. Yes, sir.

Q. Oh, you have?

Mr. HINDMAN: The defendants in cross-examining this witness do not wish to consent or admit thereby that any of the testimony given by this witness is competent, but shall insist at all times that none of the testimony given by this witness is competent and, reserving the right to continue to object we wish to proceed with the cross-examination of this witness.

Mr. LOWE: Counsel for complainants insists that the defendants in this case shall proceed the same as any other legal proposition and inasmuch as they did not object when the testimony went in it is not competent to object now.

The MASTER: Well, if you want to cross-examine the witness, you may proceed, I do not know what the effect will be on the reservation.

Q. Now, you say that in wildcat territory an operator who takes up leases with the *exception* of developing will not do so unless he takes up a large block of leases?

A. No, I didn't say that.

Q. Well, that is true, isn't it?

A. I said that they tried to get as large a block as possible in going into drill wildcat wells, the larger the better.

Q. Because if he only had a lease or two and would go down and get a well the other people around in the vicinity would get as much benefit without incurring expense as he himself, without contributing to that expense.

A. That is it, yes sir.

122 Q. So that the first well the test well, is—The purpose of that is simply to determine the presence of oil?

A. Yes, sir.

Q. Is that your testimony?

A. Yes, sir.

Q. If a person then in good faith were going into undeveloped territory with the expectation of developing his first business would be to acquire a large block of leases?

A. Yes, sir.

Q. But people do go into undeveloped territory and take only a lease or two, that is very frequently done, isn't it?

A. It has been done, yes sir.

Q. Yes. Not with a view of developing but with a view of holding them until somebody else develops, isn't that true?

A. Yes, sir.

Q. Under such circumstances leases are simply taken and held until a test is made which determines the presence of oil or the absence of oil. If the test should determine of the absence of oil the leases are simply given up; if the lease—or if the development proves the presence of oil then these leases are marketed at a high price, because of the test that has been made by other people. That is true, isn't it?

A. Why, yes, there have been properties drilled and sold, a great many of them.

Q. Then where a few leases are taken up in undeveloped territory it is for the purpose of speculation?

A. Yes, you could call any oil business a speculation.

Q. Yes, well one is for development—of course, speculation by development, and the other speculation by simply holding the lease until other- make it valuable or worthless by their expenditure and labor. That is true, isn't it?

A. You say it is.

Q. Well, I am asking you?

A. A person can take up a block of wildcat territory with the idea of drilling it and keeping it selling the oil or the gas. They can take it with the idea of selling the territory, making someone else produce it.

Q. Yes, but if—I understood you to testify in chief that a party would not proceed to development until he has sufficient territory in that community to make it profitable to him in the event that he should succeed in finding oil?

A. Yes, sir; I said that, they would like to have a good acreage back of them to protect their interests.

123 Q. That is, if the purpose is development; but if the purpose is speculation, one lease will serve the purpose.

A. No, no, not at all.

Q. Now, you was asked about who got the oil and who paid the royalty. That all depends upon the contract, doesn't it?

A. Yes, sir.

Q. You was asked how deep the wells were dug. That depends upon where you are digging them or boring them or drilling them, doesn't it??

A. Yes, sir.

Mr. LOWE: I don't think I asked him that.

Q. You was asked how much it cost to drill a well. That depends upon where the well is drilled, doesn't it?

A. Yes, sir; and the depth it is drilled to.

Q. Why, certainly, there is nothing uniform about that, is there?

A. No, sir.

Q. Just as variable as anything can be. You was asked how much it would cost to get the material on the ground, as I remember it; that depends entirely upon the location, too, doesn't it, and the price paid. In fact, there is no universal or uniform or fixed rule about anything connected with the oil business scarcely; it all depends upon circumstances and conditions as they are made; isn't that true?

A. Yes, sir; that is what I said.

Q. Why, certainly. You was asked something about the surrender clause; that operators, legitimate operators would not take leases without a surrender clause in them; is that right?

A. I said it would be a great hardship upon them to have to do that and it would necessitate—or it would curtail wildcat operation—to a great extent.

Q. Have you done any leasing in Illinois without a surrender clause?

A. No, sir.

Q. None at all?

A. None at all.

Q. Always have a surrender clause?

A. Always have a surrender clause.

Q. And you were speaking now of the leases generally in Crawford County, were you?

124 A. I am speaking of the leases generally through Illinois, yes sir.

Q. What per cent of them have surrender clauses in them?

A. Well, I couldn't answer that; I think I would be safe in saying a very large per cent, possibly 90 per cent. of the leases. You know as much about that as I do.

Q. Yes. The Seibert leases cover about 30,000 acres in this field, don't they?

A. No, not—I don't know; they may possibly cover that much.

Q. Is there a surrender clause in any of them?

A. No, sir.

Q. Not one. And they took up wildcat leases, too, did they not?

A. Yes, sir; and lost a great many of them.

Q. And they were the very first people who drilled in this territory, weren't they?

A. Yes, sir.

Q. Under leases without any surrender clause?

A. Yes, sir.

Q. Now, the surrender clause is simply for the benefit of the fellow who wants to hold a lease if he wants to hold it, but with the right to give it up if he doesn't want to hold it; that is the purpose of it, isn't it?

A. That is the purpose of it, yes sir.

Q. To bind one side and not bind the other.

A. You can put it that way.

Q. Yes. Well, now, that is really the purpose, so that the oil man may take a lease upon a farmer's land, hold it for the length of time mentioned in the lease, if he wants to hold it, but if he doesn't want to hold it during that length of time, so that they won't be required to pay anything for the privilege of holding it, isn't that right?

A. Yes, sir.

Q. Well, couldn't the same end be accomplished by putting a forfeiture clause in the lease for failure to pay or develop?

Mr. LOWE: To that I object, your Honor, as being argumentative.

Mr. HINDMAN: No, he is an expert, you put him on as an expert.

The MASTER: Well, the objection will be sustained. That is another legal proposition.

Mr. HINDMAN: I think so, too.

125 Q. Do you know of any field whose development depended upon forfeiture clauses in the leases?

Mr. LOWE: Do you mean forfeiture or surrender?

Mr. HINDMAN: Surrender clauses.

A. No, I don't know as I do, no.

Mr. HINDMAN: No, of course not. That is all.

Redirect examination by Mr. HINDMAN:

Q. Now, counsel asked you if after they developed wildcat territory and a lack of oil was found, if they give the lease back. How could they give the lease back Mr. Penn, under what conditions?

A. On the conditions that they have the privilege to surrender them.

Q. That is, under the surrender clause?

A. By a surrender clause.

Q. Now, if the surrender clause is not there, can they give them back?

A. Well, that depends on the lease. Some of them you can and some of them if you stop paying the rental- are forfeited.

Q. Well, that is a forfeiture clause, these leases have no forfeiture clauses.

A. Well, if the contract does not give you any way to let go, well then, you can't let go.

Q. And the way to give it back is through a surrender clause. Now, you have been asked about the Seibert leases. Are you familiar with them?

A. Yes, sir.

Q. Weren't they all surrendered—are you compelled to pay anything under the Seibert leases at all?

Mr. SIMMONS: Now, I don't think that is re-examination.

A. Yes, it is a kind of a license.

Mr. LOWE: We all know the Seibert leases never were of any account anywhere. That is all.

126

Testimony of A. Bruner.

Mr. ANDREW BRUNER, a witness called on behalf of complainants, being first duly sworn, was examined in chief by Mr. Lowe, and testified as follows:

Q. What is your name, age, occupation and place of residence?—you are a married man?

A. Yes, sir.

Q. All right, then, give your age.

A. My name is Andrew Bruner; my occupation is producing oil.

Q. What is your age?

A. Forty—I was born in Sixty-five, you can figure it up for yourself.

Q. Where do you reside, Mr. Bruner?

A. I live in Vincennes, Indiana.

Q. You say you are an oil producer, your business? How long have you been in that business?

A. Well, I have been practically in it since I was a boy. I have been in it since '82, 1882.

Q. Had you during that time taken leases?

A. Yes, sir.

Q. Are you familiar with the terms of an oil and gas lease?

A. Yes, sir.

Q. Do you know what ought to be in them for the benefit and protection of both the lessor and lessee?

A. Well, yes.

Q. I will ask you, Mr. Bruner, if in your judgment a surrender clause should be in a lease?

A. Yes, it should.

Q. How can oil pools in unexplored territory be developed or discovered, Mr. Bruner?

A. By drilling for it.

Q. Any other way?

A. The only way I ever find it.

Q. I will ask you if the surface indications tell what is beneath it?

A. None whatever; if there is, I don't know it.

Q. Can you tell the extent of an oil pool by the drilling of one well in that pool?

A. No.

Q. How do you tell the extent of it?

A. By further drilling.

Q. Well you mean by drilling that well deeper?

127 A. By drilling more wells.

Q. Would the fact that one well produced oil give any indication as to the extent of the pool?

A. No.

Q. In the exploration of this undeveloped territory who bears the expense?

A. The operator, the man who drills the well.

Mr. HINDMAN: We'll, we desire to object to this question and to all similar questions for the reason it depends upon the contract and the custom should have nothing whatever to do with it, and we desire to be understood as objecting to all this kind of testimony without the annoyance of repeating the objection.

The MASTER: Well, the objection to this question will be sustained; I will pass on the other questions as they come up.

Mr. SIMMONS: We move to strike out the answer given.

The MASTER: Yes, that will be excluded.

Q. In the developing of this territory I mean by that undeveloped territory, what is the custom as to the number of wells drilled at the beginning?

A. They usually start in by drilling one.

Q. Why, Mr. Bruner?

A. To see if there is any oil there or not in that locality.

Q. In the developing of this unexplored territory, do you get any indications from drilling as to whether or not there is oil in the territory, although that well did not produce oil, or does not?

A. If it is a producing well the drilling of that well would not be any indication at all as to what would be around it, near by.

Q. What would be the effect of drilling a large number of wells in unsettled territory as to expense?

A. The effect would be of spending a large amount of money foolishly.

Q. Before an oil producer develops a territory, what does he do in regard to obtaining area?

A. Well he always gets as large a block of leases as he can.

Q. Can you give any reason for that?

A. So as to justify the risk he has got to take. It is necessarily very great.

Q. From your experience as broad as it is, Mr. Bruner,
128 is it your judgment that a prudent oil operator can afford to go into unexplored territory and take leases as you have indicated they should do, by obtaining a large area, and agree to develop it without a surrender clause in the lease?

A. Well, he could not do it unless he had a forfeiture clause, which amounts to the same thing.

Mr. LOWE: You may ask the witness.

Cross-examination by Mr. HINDMAN:

Q. You think Mr. Bruner, that you know what ought to be in an oil lease?

A. Yes, I think so, for the protection of the operator and the land owner as well.

Q. How long have you known that, Mr. Bruner?

A. I have known it about 15 years, 20.

Q. Did you know it when you got hold of the Brubaker lease?

A. Yes, sir.

Mr. LOWE: To that I object, your Honor. You see, Mr. Hindman and Mr. Bruner have had some feelings between them; they were on the opposite side of that case.

The MASTER: Well, I don't think that is competent, what he knew as a matter of law, because lots of us think we know some law.

The WITNESS: I don't object to Mr. Hindman asking questions.

Mr. HINDMAN: No, Mr. Bruner and I never had a word, never had any feeling that I know of.

The WITNESS: No, I can answer your questions, all about the Brubaker case.

Mr. HINDMAN: It is simply to—Along the line of examination that was drawn forth. Does the court hold it was not competent?

The MASTER: I sustained the objection to that question; there was an objection made.

Exception by defendant.

Q. You are the same Andrew Bruner who was in the case of Bruner against Hicks, decided by the Supreme Court of the State of Illinois?

A. Yes sir.

Q. You are the Andrew Bruner who had an interest in that lease?

A. Yes, sir.

129 Q. That lease, as I remember it, had a forfeiture clause in it?

A. Yes, sir.

Q. And you lost the lease because of the forfeiture clause, didn't you?

Mr. TROUP: Wait, we object to that.

The MASTER: Objection sustained.

Exception by defendant.

The WITNESS: That was no reason why the forfeiture clause should not be there, if I did, as a matter of equity is is not.

Q. In your original examination you said something about a surrender clause serving the same purpose. What do you mean by that?

A. I said that a prudent operator would not take a lease without a surrender clause or forfeiture clause, which amounts to the same thing; a forfeiture clause is the same thing as a surrender clause.

Q. What do you mean by a forfeiture clause?

A. The lease becomes void on that account, the stop paying rental. I was advised by a prominent attorney of Illinois not long ago to make leases—the first one I ever seen without a forfeiture clause—to make them that way, simply stop paying and the lease is void.

Mr. LOWE: You mean forfeiture clause?

The WITNESS: It is the first one I ever saw without a forfeiture clause to get around the Illinois Supreme Court decisions he advised making it that way, but it is the same thing exactly if you stop paying and on the other hand you have a right to surrender.

Q. The purpose that you have in mind is to have such a lease as will hold the landowner, as will bind him, and at the same time leave the operator free to terminate it at any time he pleases, that is the purpose of it?

A. Yes, sir; that is the purpose, but——

Q. Their forfeiture——

A. But understand you have to pay the landowner for that right; you pay him for the time—by paying these rentals you are paying the landowner for that right, and he usually takes that money as long as it doesn't look good and some other fellow don't come along and try to jump it; and then if it becomes valuable by your exploring and energy and expenditure of money, he will try to get away from it, if he can.

130 Q. Yes.

A. But he is accepting your money just the same.

Q. Yes, a great many people do that, and then there are others you find——

A. Not a great many, not a majority of them, no, that is not my experience.

Q. And you find also a great many people who will take a lease and hold it and not develop it, but hold it until somebody else develops in that neighborhood, expenditure of money and industry——

A. Yes sir.

Q. And enterprise, will make his territory valuable?

A. But in doing that he pays the landowner for that chance.

Q. Yes, I am speaking now of the fellow who has not done anything toward development but simply held his lease?

A. He pays for it, he pays for the right and if the other fellow is exploring and fails, he has lost his money but he has to pay the landowner. It doesn't cost the land owner one cent.

Q. Now, the thing that is valuable in a community is the initial or test well, isn't it?

A. Well, not necessarily, even oil wells where there never was any oil has been valuable to a community for the reason that the speculator or oil operator pays the land owner for his rentals a nice income which very often pays his taxes, and he never gets a barrel of oil on his property.

Q. Certainly, but that isn't profitable to the man who holds the leases in that community?

A. Why, of course not, but it doesn't cost the landowner anything.

Q. So that the thing that is valuable to the operator is to have somebody make a test in the community, isn't it?

A. Of course, that is—

Q. Yes. And if a person then holding a couple of leases in a community—it would be very valuable to him to have somebody come in that community and make a test on either that land or some adjoining land?

A. Yes, sir, considered valuable, yes sir.

Q. Yes. That is where the risk is, the great risk is, is the initial or test well, isn't it?

A. That is the greatest risk, but if you go in there and
131 take just one lease and pay a certain stipulated sum for it, pay the rental from month to month, you are taking a risk, too.

Q. Oh, yes, you are risking the amount of money paid for rent.

A. Yes, sir; and the risk may be as great to him as it is to the man drilling the well, because he may not be able to pay it.

Q. Then a fellow who has a lease on land would profit very much by having someone go upon that land and put down a well, wouldn't he?

A. He wouldn't profit anything if he didn't find anything.

Q. No, but he could then end his lease. But if it should result in the finding of something, then it would be very profitable?

A. Then it would be profitable to him.

Q. And some people do take leases with that in view, to have somebody else make developments?

A. Yes, sir.

Q. And remain idle, dormant, quiet, watching other people making developments for their benefit, that is true, isn't it?

A. Some people do that.

Q. Some few people at least do that?

A. Yes, sir. Well, as a rule, they are not our people who do that.

Q. No, they are scalpers?

A. They are what we call tenderfeet, but don't be too hard on the scalpers, because they are valuable many times to an oil country; they will develop an oil country many times. The scalper is valuable, although we call him a shyster.

Q. Now, to come back to this case, if a man has a lease in a community undeveloped, he watches very closely the development in that vicinity, doesn't he?

A. Well, as close as he can. I have heard that discussed here today, but I must say—I have leases in the State of Illinois that I have not seen for two years that I pay rental on.

Q. It is the development in a community that may add thousands of dollars to the value of that lease?

A. Yes, sir.

Q. And it is customary with people who are in the oil development business who hold leases, to have persons even hired to watch development, isn't it, and report?

A. No, it is not; no.

132 Q. Doesn't every large oil operator have men who watch the development and watch the number of wells that are drilled in there or the depth of them—

A. No.

Q. The distance through the sand and report daily?

A. I never knew of anyone doing that outside of the very largest company. Take the Ohio, they keep a man for that purpose, but we never have had, and we are ordinary average producers of the field.

Q. Isn't it true, Mr. Bruner, that scarcely a new well—that you are acquainted with every new well that is being drilled in a field in which you have leases?

A. I didn't understand the question.

Q. Aren't you familiar and acquainted with every new well that is started in a vicinity in which you have leases?

A. No, no.

Q. Well, it isn't long before you would get information about it?

A. Yes, sir; wells have come in right near to my property that I didn't know anything about, but it wouldn't be long after they were in until we would know it.

Q. Now, we will get it better—

A. Let me explain how that comes about. It is like finding a gold mine, if you please; if we own a man's lease and some person drills a good well near by we would never get to bed until we knew it, because the land owner is interested to the extent of notifying you because he is anxious to get his share. It is not necessary for that reason to have any person watching the development; we will find it out if there is any oil found.

Q. Yes, but if it is a bare well you try not to find it out?

A. Well, it would be very often to our advantage if we didn't, yes.

Q. Yes, and if you did find it out you would forget it right away, is that right?

A. Well, not always, no.

Q. If you should be called upon to testify to it?

Mr. TROUP: We object to that.

Mr. HINDMAN: That is all.

133

Testimony of J. H. Faubel.

Mr. J. H. FAUBEL, a witness called on behalf of complainants, being first duly sworn, was examined in chief by Mr. Lowe, and testified as follows:

Q. What is your name, occupation, and place of residence?

A. J. H. Faubel, my residence is in Portersville, Crawford County, Illinois; I am superintendent for the Freehold Oil & Gas Company; my post office address is Robinson.

Q. What are your duties as superintendent of the Freehold Oil & Gas Company?

A. Looking after the property in general, making locations.

Q. What kind of property?

A. Oil and gas leases. See when the wells are drilled deep enough and matters pertaining to general development, leasing and so forth.

Q. Do you have anything to do with the leasing part of the business?

A. Yes, sir.

Q. What is the business of the Freehold Oil & Gas Company, I will get at it that way?

A. They are in the oil and gas business in different fields in this country.

Q. What branch of the business?

A. Producing.

Q. Now, as superintendent of that producing business is it your business to take leases?

A. Very often, yes sir.

Q. Are you familiar with the terms and conditions of the oil and gas leases in the Illinois oil field?

A. Yes, sir.

Q. What experience, I mean how long a time, have you had, in the active business of working in oil territory?

A. About 20 years.

Q. In your judgment should an oil and gas lease contain what is known as a surrender clause?

Mr. SIMMONS: Now, that is the same objection. We interpose the same old objection.

The MASTER: Yes, the objection will be sustained.

Exception by complainants.

Q. How can you ascertain the existence of an oil pool in undeveloped territory?

A. By drilling wells.

134 Q. Does the surface indication give you any idea of what is beneath the soil?

A. No, sir.

Q. Will one test well indicate to you what the territory is?

A. No, sir—yes, it will tell you whether there is oil or gas there.

Q. Well, does it indicate the extent of the pool?

A. Oh, no.

Q. And from a producing oil well can you tell the course of direction of the pool?

A. No, sir.

Q. How can you get the direction?

A. By drilling more wells.

Q. What would be the manner of drilling those wells as to time?

A. That would largely depend on conditions.

Q. Well, I mean in undeveloped territory; would they all be drilled at once or—

A. Oh no; you will drill one well and if you get encouragement, strata indicating that there is oil there, you will want—in the first place you want territory enough to justify you and you want to feel your way.

Q. And how can you do that?

A. By drilling in different directions, and in the direction you get the best results you follow that up.

Q. Who has the expense of developing those wells?

A. The man that owns the lease.

Q. Is any of that expense borne by the landlord or owner of the land?

A. Not that I know of.

Q. Before an operator will explore undeveloped territory or deal in wild cat territory, what would be demanded before he would commence by way of area in leasing?

Mr. SIMMONS: Now, we object to that. A general question of that kind is incompetent.

The MASTER: Oh, he can show what the custom is with reference to getting a large or small acreage.

Exception by defendants.

Q. You may state what the custom is, Mr. Faubel before an oil operator will explore or drill an oil well in undeveloped or wild-cat territory?

Mr. SIMMONS: Now, we still object.

The MASTER: Well, he can answer that.

135 A. It is essential to get as much land as you can in as solid a block as you can, so as not to have any vacant leases, or premises in a radius of whatever land that you can get together. It often occurs that you have to go over a second or third time to get it in that shape and at an outlay of some money.

Q. Why doesn't the operator wait until after he has his test well drilled, before he secures this large territory?

A. His drilling or starting the well induces a scalper or men who watch where there is new development and they will come in there and take up land for the purpose of holding it until his well goes in and probably sell it to the man who is doing the drilling.

Q. What is the custom in developing wildcat territory as to the number of wells drilled at the beginning?

A. At the beginning generally drill one well.

Q. Why don't you drill several at the same time?

A. You want to know if you would be justified in drilling the second one after you drilled the first one.

Q. Well, would this large area be developed rapidly?

A. It would depend on conditions somewhat.

Q. What would be the conditions?

A. Well, if it were gas and your lease provides for oil and gas,—if it were gas you would have to market it, find a place to market your product, buying a franchise from a near city or town that would take some of it; lay a pipe line at a large outlay and maybe have to buy an average to maintain your product after you got it and the place to market it which would naturally be slow.

Q. What would be the manner of getting oil to the market, Mr. Faubel the manner of transportation?

A. Mostly by pipe line, but in new and undeveloped territory

they lay short lines to the nearest railroad and put in a roading route, ship it by rail.

Q. Is that a slow or rapid manner of transportation?

A. Very slow.

Q. What is the best manner of transportation to the market?

A. Pipe line.

Q. As soon as a well is developed in wildcat territory is there a pipe line there at once?

A. No, sir.

136 Q. How is it gotten there; I mean, who put it there?
A. It is not put there until there are enough wells that demonstrate that it is profitable to go to the outlay of laying a line there.

Q. I will ask you if one or two or three wells in a wildcat territory would be sufficient to warrant the laying of a pipe line?

A. It would depend upon how far you would have to pay that line to get it to the refinery, to market, to get the output of the well and the gravity of the oil and so forth.

Q. Is it customary that the lease provides that a rental be paid if delayed in drilling?

Mr. SIMMONS: We object to that, your Honor.

The MASTER: Objection sustained.

Exception by complainants.

Q. Taking into consideration your large experience in oil fields, and as an oil operator and producer, I will ask you if in your judgment the surrender clause should be inserted in an oil and gas lease?

Mr. SIMMONS: Now, to that the defendant objects for the reason that it is not a question of fact but a mere question of contract and a matter of law.

The MASTER: Objection will be sustained.

Exception by complainants.

Q. In case an oil and gas lease taken in wildcat territory or undeveloped territory does not contain the surrender clause would responsible, honorable oil men, oil operators, take the lease and develop the territory?

Mr. SIMMONS: Now, wait, to which the defendants object.

The MASTER: Do you mean would it generally be marketable?

Mr. LOWE: No. I mean would they go in that territory and develop it if they could get the right of surrender in case it proved to be unbearing territory?

The MASTER: Well, that presents a question of fact; I think he may answer the question.

Exception by defendant.

Mr. LOWE: I mean, whether they would take the lease without the surrender clause in wildcat territory and then go in and develop it?

Mr. HINDMAN: Well he includes in the question, "honorable men and responsible men."

Mr. LOWE: Well, responsible men, I mean, people who would carry it out.

137 The MASTER: Well, if there is any general custom about their purchasing leases of that kind you may show that. Exception by defendant.

Q. Is it customary in the purchase or taking of leases in wildcat territory or undeveloped territory by solvent men, I mean by people who are able to produce and develop the territory, to take those leases in large areas or blocks without the surrender clause being inserted in the lease?

A. No, sir.

Mr. LOWE: You may take the witness.

Cross-examination by Mr. HINDMAN:

Q. The purpose of the surrender clause in a lease is to enable the operator, the oil operator to hold the lease, if he desires to do so or to give it up if he doesn't. Is that it?

A. I don't think so; I don't think it has anything to do with the holding of the lease, it is only for the surrender—

Q. That has nothing to do with the holding of the lease?

A. Yes, sir.

Q. Would you take a lease—would any oil operator take a lease in which the former had the right to surrender it at any time or to cancel it at any time?

Mr. LOWE: That has nothing to do with the answer to the question.

Mr. HINDMAN: Oh yes, it has.

Mr. LOWE: Not a thing; he says the manner of the holding of the lease.

Mr. HINDMAN: Let's see if it hasn't.

Q. The surrender clause you have reference to is the surrender clause giving the operator the right to surrender when there is nothing on it.

A. Yes, sir; it is.

Q. Yes. You never heard of an oil man taking a lease and never saw one in which the farmer would have a right to terminate it at any time?

A. A farmer does not take any risk any chance—

Q. I am asking you—

Mr. LOWE: Let him answer.

Q. If that is true; you mean by the surrender clause a surrender clause that will enable the oil operator to terminate it at his pleasure?

A. Yes, sir.

Q. But not that will enable the landowner to terminate it at his pleasure?

138 A. No, sir.

Mr. LOWE: Now, you may state what he shut you off from a moment ago.

Mr. HINDMAN: Well, he has answered.

Mr. LOWE: Not at all. He was telling now why that was.

Mr. SIMMONS: Oh, well, that isn't responsive.

The MASTER: Oh, well if there is anything further to answer, why, of course, he may answer.

Mr. LOWE: Have you any further answer to make?

A. I think not.

Mr. LOWE: Very well.

Q. Now, the purpose in taking up a large body of territory before the initial test is made, or rather the reason for doing so is that in order to make the test necessary to determine the presence of oil entails a large expenditure of money and labor, doesn't it?

A. Yes, sir.

Q. The person who expends this amount of money and labor desires to protect himself by having a large scope under lease so that he will derive the benefit from his exploration if it turns out good; that is true? isn't it?

A. In a sense, yes. In another, he needs land enough that if he finds stratas that produce oil or gas even though it may not be in paying quantities he would want land enough to go east or west and drill an additional well to try and find it.

Q. Now, the test well, the first well, or test well is one in which the greatest risk is. After the test well is in and the presence of oil has been determined then as a rule there is not much risk in putting other wells in the vicinity of that producing well?

A. Yes, there is.

Q. Not so great?

A. Very often it would be much better if you got a dry hole in the start so you wouldn't spend so much money.

Q. Yes, that is true.

A. The risk is just as great.

Q. But do you say that a dry hole would add more to the value of a lease than a producing well?

A. It would depend upon the amount of the producing well.

Q. Then what is the purpose of a test well?

A. The purpose is to find out in what quantities, whether
139 it is—

Q. Yes. Suppose they are dry holes, absolutely dry holes?

A. Then you go somewhere else.

Q. What?

A. Surrender your lease and go somewhere else.

Q. Why would that be more valuable, make a lease more valuable than a producing well?

A. If it were enough to cause you to spend a lot of money it would be of far more value to a man than to pay out money.

Q. I don't believe you understood me when you answered my previous question.

Mr. LOWE: Yes, but you don't understand him.

Mr. HINDMAN: Yes, I do, I think.

Q. A dry hole does not add anything to the value of a lease, does it?

A. No, sir.

Q. A man having a lease and gets a dry hole on it or someone else

puts a dry hole on it he would consider his lease worthless and he would surrender it rather than incur the expense of putting down another one until there is something to indicate that there is oil there.

A. Well, that would depend on conditions.

Q. If there were other wells in the vicinity that would indicate that possibly this dry hole was an accident he might be induced to put down some more wells?

A. Yes, sir.

Q. But if there was nothing but a dry hole to indicate the presence or absence of oil a dry hole would simply condemn a small lease, a small tract, and the party would surrender it. That is ordinarily the case, isn't it?

A. Generally.

Q. But even on a small tract, 20 or 30 acres, with a non-producing well on it you may have some portion on it capable of producing oil?

A. Yes, sir.

Q. And that would be determined after some period of time, after developments in the neighborhood have been made?

A. Yes, sir.

Q. Now, it is also a custom among a certain class of people to take leases even on small tracts, with an idea not of developing himself but with the hope that somebody else develop in
140 that neighborhood and thereby make his small holding valuable, is that frequently done?

A. No, sir.

Q. Isn't that frequently done?

A. No, sir; not in wildcat territory.

Q. What?

A. No, sir; not in wildcat territory.

Q. Then nobody takes up a small batch of leases at all?

A. Not in undeveloped territory away from any developments.

Q. Never heard of anybody?

A. Never heard of anybody, no, sir.

Q. Taking three or four leases?

A. Oh, no, wasting time and money.

Q. Isn't that the case right here now before us, weren't these leases taken in wildcat territory?

A. No, sir.

Q. Isn't it wildcat territory?

Q. It was in a sense, but there was oil in the neighborhood, in the vicinity, in the same county.

Q. And the party who took these leases from the landowner did not lease up a scope of territory there, did he?

A. He might not have been able to get it.

Q. No, but he didn't have it, did he?

A. It seems not.

Q. He got in between other people, didn't he?

A. Yes.

Q. Yes. Depending upon the developments made by other people to make this lease valuable, isn't that true.

A. Well, I know nothing about that, what his object was in taking it.

Q. Well, speaking now from the experience of an oil man if a person were to take a lease on a twenty and a thirty-acre tract of land only surrounded by territory that was leased by other people—

A. Yes.

Q. It would not be for the purpose of developing it himself, would it?

Mr. TROUP: Now, wait, we object to that.

The MASTER: Oh, I can't see how a witness can tell what the purpose is in taking these things. The fact of the matter is I don't see how very much of this testimony along this line is relevant.

Mr. HINDMAN: I don't either. That is what we have
141 been contending all the way along.

The MASTER: Objection sustained.

Exception by defendant.

Redirect examination by Mr. LOWE:

Q. Now, you started to tell a while ago, Mr. Fauble and I think was intentionally interrupted, why the farmer did not need the surrender clause. I wish you would make that full.

Mr. HINDMAN: Now, we object to that.

Mr. LOWE: I don't see why; he was stating a while ago what it was and you interfered.

Mr. SIMMONS: It was not responsive to any question, your Honor.

Mr. LOWE: Well, it is now.

Mr. SIMMONS: Well, we object because it is not redirect examination.

The MASTER: Well go ahead and state it.

Exception by defendants.

A. The land owner gives his consent for you to develop there to make him some money. The only chance that he takes is to permit you to spend money, not for his benefit only, but for your mutual interests. If you get nothing it has so often occurred that he would make you hold it, if there was no forfeiture clause or surrender clause in it making you pay rent for an indefinite time. For that reason the farmer can gain at your loss.

Q. Does he have any responsibility?

Mr. SIMMONS: Now, wait, your Honor, we object to that as being wholly governed by contract.

The MASTER: Oh, I don't think what his responsibility is is material. He has testified that it was done at the expense of the cooperator.

Exception by complainant.

Q. Well, now, let me ask you this question: You stated a while ago in answer to a question by a gentleman that it would be better if there were dry holes, be more profitable, by that did I understand you that if it were a small oil well it might be an inducement to

the operator to go on and spend more money and then not have any producing oil well?

A. That is what I meant to convey.

Mr. LOWE: You are excused.

Testimony of H. Gasaway.

Mr. HENRY GASAWAY, a witness called on behalf of complainants, having been first duly sworn, was examined in chief by Mr. Lowe, and testified as follows:

Q: What is your name, age, occupation and place of residence?

A. Henry Gasaway, age 60 past, place of residence Martinsville, Illinois, Clark County, my present occupation is an attorney at law, my occupation at the time of this transaction August 7 or April 7, 1906, was cashier of the Exchange Bank at Martinsville.

Q. The lease provides that rentals shall be paid under the terms thereof among other things at the Exchange Bank of Martinsville, Illinois. Were you cashier of that bank on April 4, 1906?

A. I was.

Q. Were there any rentals there, I mean any money left there as rental by E. N. Gillespie for Susannah Smith?

A. There was.

Q. Was there any left there for James A. Smith, being the defendants in these two cases?

A. There was.

Q. By whom was it left?

A. By E. N. Gillespie.

Q. I hand you Exhibit 10 (handing paper to witness) and ask you what that is.

A. That is a check drawn—it is dated Grantsville, West Virginia.

Mr. HINDMAN: Well, we object, the check will speak for itself.

Q. Just tell what it is.

A. It is a check on the Calhoun County Bank, payable to the Exchange Bank for \$27.50 for James and Susannah Smith rentals, signed by E. N. Gillespie.

Q. Was that check ever delivered to you?

A. It was, sir.

Q. For what purpose?

A. To pay the rents of the parties, James Smith and Susannah Smith.

Q. Did you obtain money on that?

A. I gave—I put the money or caused the money to be placed to the credit of James A. Smith, I believe it was, and Susannah Smith.

143 Q. Have you any evidence of that fact?

A. I have the original duplicates—or I mean the original deposit slips here. Those slips were made out by my instruction (witness hands paper to attorney).

Q. I will ask you when were these credits placed to the credit of the respective parties?

A. That credit was placed or that was placed to the credit of Susannah Smith, April 7, 1906.

Q. And is the same true of James A. Smith?

A. Yes, sir. Do you want me to give the amounts?

Q. Exhibit No. 12 was placed to the credit of whom?

A. Exhibit No. 12 was placed to the credit of Susannah Smith, April 7, 1906.

Q. The amount?

A. The amount was \$22.50; the memorandum is E. N. Gillespie, I marked it.

Q. And whose credit was that Exhibit 11, the amount recited in Exhibit 11 placed?

A. Exhibit 11 shows credit of \$5 placed to the credit—

Mr. HINDMAN: Now, we object; they will speak for themselves.

The MASTER: Yes, don't state what the Exhibit shows.

The WITNESS: Just state the Exhibit then?

Q. Yes.

A. Well, it was placed to the credit of James A. Smith, April 7, 1906.

Mr. LOWE: We now offer in evidence Exhibits 10, 11 and 12.

The MASTER: If there is no objection, they will be admitted.

Copies of which said Exhibits are as follows:

EXHIBIT 10.

Check Dated Apr. 4, 1906.

GRANTSVILLE, W. VA., April 4th, 1906. No. 901.

The Calhoun County Bank, Pay to the order of Exchange Bank Twenty seven and 50/100 Dollars. For James and Susannah Smith rentals.

\$27.50/100

E. N. GILLESPIE.

(Endorsed on the back:)

Pay Bankers National Bank, Chicago, or order, all prior endorsements guaranteed. Exchange Bank of Hammond, Sallee, Martinsville, Ill., H. Gasaway, Cashier.

144 Pay to the order of any bank, banker or trust Co. all prior endorsements guaranteed. April 9, 1906, the Bankers National Bank, Chicago, Illinois, E. P. Judons, cashier.

Pay to any bank or banker, or order previous endorsements guaranteed, April 11, 1906, Merchants National Bank, Baltimore, Md., William Ingle, Cashier.

All previous endorsements guaranteed; pay to the order of any bank or banker Girard National Bank, Philadelphia, Joseph Wayne, Jr., Cashier.

Pay to the order of Bank, Banker, Bankers, Trust Company, prior endorsements guaranteed. First National Bank Harrisburg, West Virginia, A. J. Wilson, Cashier.

EXHIBIT 11.

Deposit Slip.

Exchange Bank of Hammond & Sallee, Deposited by James A. Smith, Martinsville, Ill. Apr. 7, 1906. Checks, as follows. E. N. Gillespie, \$500.

EXHIBIT 12.

Deposit Slip.

Exchange Bank of Hammond & Sallee, deposited by Susannah Smith, Martinsville, Ill., Apr. 7, 1906. Checks, as follows: E. N. Gillespie, \$22.50.

Testimony of H. Gasaway.

Q. What was that money left there for, Mr. Gasaway?

A. To pay rentals in the amounts named to J. A. Smith and Susannah Smith for rentals on oil and gas leases, as I understand it, or I was told at the time the check was given me.

Mr. HINDMAN: Not what you was told.

Mr. LOWE: Yes, if by the party who left it.

A. By the party who left it, Mr. Gillespie in person.

Mr. SIMMONS: Well, not conversation in our absence.

The MASTER: Well, I think he can show what direction was given to him. I don't think it would be proper to show conversations, but what directions were given him.

Exception by defendant.

Q. What direction did E. N. Gillespie, the person who deposited it give you when he left his check?

A. He directed me to place those amounts named on that slip to the credit of James A. Smith and Susannah Smith.

Q. And what did you do in pursuance of that?

145 A. That I caused to be done by Mr. Sinclair who was assistant cashier at the time.

Q. Are you still the cashier of that bank?

A. No, sir; I am not.

Q. When did you cease?

A. July 15, 1906.

Q. Did these respective Smiths call for that money?

A. No, sir.

Q. If they had of called would they have gotten it?

Mr. SIMMONS: Wait, we object to that now.

The MASTER: Well, as I recollect the leases provide that the rentals shall be paid at Martinsville. He may answer whether if it had been demanded it would have been paid to them.

Exception by defendant.

A. That money could have been drawn on check by those parties any time they called for it.

Q. By those parties you mean either party—

A. By James A. Smith or Susannah Smith.

Q. This bank was the Exchange Bank of Martinsville?

A. The Exchange Bank of Hammond & Sallee of Martinsville, Illinois, is the real name. Hammond & Sallee, the owners of the bank. It was a private bank.

Q. Is that bank still in existence?

A. No, sir; the bank has been—There has been an organization of the State Bank, the Martinsville State Bank as successor of the Martinsville Exchange Bank, or the Exchange Bank of Hammond & Sallee, Martinsville, Illinois.

Q. Was that bank the one you were cashier of usually known as the Exchange bank of Martinsville?

A. The Exchange Bank of Hammond & Sallee, Martinsville, Illinois.

Q. Where is the Martinsville State bank located with regard to where the Exchange Bank was?

A. In the same building, with the same furniture and fixtures, with the exception of a slight change made in the counter.

Q. Was it the same room?

A. The same room, yes sir, 130 Main Street, Martinsville.

Q. And that is where it was on May 22d, 1905?

A. Yes, sir.

Q. And been there continuously since?

A. Been there ever since it was first started and up to the present time.

146 Q. Was there an assistant cashier at the time you were cashier?

A. Yes, sir.

Q. You may give his name if you recollect?

A. Fred A. Sinclair succeeded me.

Q. And has been the cashier ever since?

A. Yes, sir, I might say that he was under the organization of the State Bank. He was made cashier. I retired at the time of the organization of the new bank after assisting and organizing the bank and he took my place in there as the cashier of the Martinsville State Bank and is now cashier.

Mr. LOWE: You may ask him.

Cross-examination by Mr. HINDMAN:

Q. Did you receive this check from Mr. Gillespie in person?

A. I did.

Q. He was there in the bank himself?

A. He was there in person in the bank and handed it to me personally.

Q. You of course had bookkeepers in the Bank?

A. Yes, I was one, Mr. Sinclair the other.

Q. There was an entry made upon certain books in relation to this transaction?

A. There was, yes sir.

Q. What entries?

A. The amount of the deposits and the names of Susannah Smith and James A. Smith.

Q. In what book were those entries?

A. In the looseleaf ledger. It was the looseleaf at that time, but it has since been bound together since the reorganization of the bank; the old ledger has been bolted together in such a way that the leaves are fastened in there and it is quite a large bulk.

Q. Looseleaf ledger?

A. Yes, sir.

Q. No other entries made in any other book?

A. That was our limit there, yes sir.

Q. Didn't you keep an individual ledger?

A. This was the individual ledger in itself, the looseleaf ledger was the individual one.

Q. The individual ledger?

A. Yes, sir.

147 Q. You then placed on that day twenty-two fifty to the credit of Susannah Smith?

A. Yes, sir; or I caused it to be done.

Q. Yes, and five dollars to the credit of James A. Smith?

A. Yes, sir.

Q. That was on April 7th, you say?

A. April 7th, yes, sir, 1906, is my recollection. These memoranda are correct there, those are the original slips.

Q. Was Susannah Smith keeping an account in your bank at that time?

A. She was not.

Mr. LOWE: We object to that, your Honor; it is immaterial whether she kept an account there or not.

The MASTER: Oh, I think they may show that.

Exception by complainants.

Q. Did James A. Smith have any account in your bank?

Mr. LOWE: To that we object for the same reason.

The MASTER: He may answer.

Exception by complainants.

The WITNESS: I started to answer and an objection was made. I didn't hear any ruling upon it.

The MASTER: You may answer.

A. I do not think that either of them had any deposit there at that time; I don't have any recollection of it.

Q. The only entries then of any credit in your bank in the name of James A. Smith or Susannah Smith were these credits?

A. At that time, yes sir. It is my recollection that those are the original credits or the first ones.

Q. Do you remember of writing any letters in relation to that transaction?

A. I understand that a letter was written, but I don't remember it at all; I have no recollection of it at all.

Q. Do you know when that letter was written?

A. I do not, because I don't recollect of the letter being written. In the first place, I would like to make an explanation there. I asked Mr. Gillespie the address.

Mr. SIMMONS: No, no, no.

The WITNESS: Well, I didn't know the address and I couldn't—

Q. Did you receive a letter from Mr. Smith in relation to a deposit of this kind?

A. I have no recollection of it at all.

148 Q. You say you had some knowledge of the letter being written. By whom was that letter written?

A. Since I came here I have been told that Mr. Smith said he received a letter from our bank but I could not say whether I wrote it or who wrote it, but I have no knowledge of the letter at all, or at least no recollection of any inquiries being made for the money.

Q. Who attended to the correspondence of that kind in the bank?

A. Generally, I did.

Q. If the bank should receive a letter from James A. Smith asking if any money had been left there by E. N. Gillespie and a letter had come from that bank saying that no such money had been left who would have been the person who would have attended to that correspondence?

A. As a rule, I did; as a rule, I answered them.

Q. Was there anybody else in that bank charged with a duty of attending to correspondence of that kind at that time?

A. Mr. Sinclair being assistant cashier was, in my absence, sometimes in my presence, or when I would happen to be out, attend to the business of the bank. If there were any letters written—

Q. How long— You know Mr. James A. Smith himself?

A. I never saw him until today to know him and I don't know that I know him now, except as he is pointed out to me. If I ever spoke to him in my life—

Q. I will ask you if he didn't come there in person long after this in August, I think it was, of that year, and in person—after receiving a letter from you in person ask you if any money had been left there by Gillespie and that you told him there had been none.

Mr. LOWE: We object to that, your Honor; it is wholly immaterial, because this check or the money was deposited where they directed it to be and Gillespie could not be bound by it one way or the other.

The MASTER: I think that question is proper whether he made a statement which would be contradictory to his testimony.

Exception by complainants.

A. Well I will say in answer to the question this in regard to the letter. The only way that I would ever believe that I wrote the letter

149 would be for somebody to present that letter to me or somebody that I knew to be reputable that would testify to it. And so far as Mr. Smith calling there I have no recollection of it, and if he ever called there the first thing that I should have done—

Mr. SIMMONS: No, no, no, did he?

A. I would like to state the rule of the bank.

Mr. SIMMONS: Well, now, we object. Let that question be answered.

The WITNESS: I don't say he didn't call. I say I have no recollection of him calling, but if I——

Mr. SIMMONS: No, no, just wait. Now, your Honor, I am going to insist that the witness——

The WITNESS: I will answer your questions when the proper time comes.

(Question read.)

A. I say I have no recollection of him calling there and I have no recollection of writing the letter.

Q. Do you know Mr. Wilcox?

A. Mr. Wilcox? I think I do. He is a resident of Casey. He is the gentleman that I think——

Q. Well the oil man.

Mr. SIMMONS: Do you know him?

A. Yes, I think I know the gentleman; I think I met him a time or two.

Q. Do you know of Mr. Wilcox calling at the bank personally and making inquiries as to whether or not any money had been left by Mr. Gillespie in payment of any rental.

Mr. LOWE: Now, just a moment; for the same reason we object to this question, your Honor. It is not material as to the complainants in this suit.

The MASTER: Well wait until he completes his question.

Mr. LOWE: I thought he did.

The MASTER: Is that all of it?

Mr. HINDMAN: No, sir.

Q. In payment of this rental?

Mr. LOWE: Now, I renew my objection for the reason stated.

Mr. TROUP: No time or place fixed in this question.

The MASTER: You have not asked him about any statement to Mr. Wilcox.

Mr. HINDMAN: It is preliminary to that.

The MASTER: Well, the rule is to fix the time and place and gave the conversation or alleged conversation.

Exception by defendants.

150 Q. Do you remember of Mr. Wilcox calling at your bank?

A. I do not in regard to this matter.

Q. About in May, 1906, I will ask you if Mr. Wilcox, H. E. Wilcox, called at that bank?

A. Not to my knowledge; I have no recollection of it at all.

Q. Now, did you have any telephone communication in relation to this deposit?

A. I have no recollection of it, no knowledge of it at all.

Q. I will ask you if you were not called up on the 1st day of September, 1907, by Mr. Willett from Robinson, Illinois, and asked

concerning this same deposit and that you informed Mr. Willett over the telephone on that day that no money had been left at that bank.

A. What was the date of that please?

Q. The first day of September.

A. What year?

Q. 1907?

A. I will say positively no.

Q. 1906?

A. I was not in the bank at that time.

Q. You had left the bank before that?

A. Yes, sir.

Q. And if there had been a record kept the record was still in the bank?

A. The records are all there, everything is there; I took nothing away with me.

Mr. HINDMAN: That is all.

Redirect examination by Mr. LOWE:

Q. Now, since they have raised that question, Judge Casaway, was this money deposited in the bank to the credit of these folks on the day that *that* the certificate bears?

A. It was.

Q. Has it remained there to their credit from that date until you left the bank?

A. It has.

Q. Subject to their order at any time?

A. Subject to their order at any time.

Q. Have you any interest in the property in controversy in these leases in any manner whatever?

A. In the bank?

Q. No, sir; in these—

151 A. In this matter here?

Q. Yes.

A. I am perfectly disinterested. It doesn't matter to me which way the suit goes, who gets the money or anything. I am not interested one farthing, nor hardly interested enough to come here as a witness if I had not been compelled to.

Mr. LOWE: You are excused, Judge.

Testimony of F. Sinclair.

Mr. FRED SINCLAIR, a witness called on behalf of complainants, being first duly sworn, was examined in chief by Mr. Lowe, and testified as follows:

Q. What is your name, age, occupation and place of residence?

A. My name is Fred H. Sinclair, age 34, occupation, cashier of the Martinsville State Bank, Martinsville, Illinois.

Q. And is that your home?

A. That is my home.

Q. How long have you been cashier of this bank.

A. Since the morning of July 16, 1906.

Q. Is this bank a successor of any bank?

A. Yes, sir.

Q. Name the bank.

A. Exchange Bank.

Q. Did you bear any relation to the Exchange Bank during its existence?

A. Yes, sir.

Q. What was that?

A. I was assistant cashier.

Q. I will ask you who was assistant cashier of that bank on the 7th day of April, 1906?

A. Who was the assistant cashier?

Q. Yes.

A. I was.

Q. And how long did you remain the assistant cashier?

A. Until July 16th, until I became cashier July 16, 1906, is when I ceased to be assistant cashier of the Exchange Bank when the Exchange Bank ceased to be and the Martinsville State Bank took on the business.

Q. Do you agree with Judge Casaway when he says that the Martinsville State Bank occupies the same room that the Exchange Bank did?

A. Yes, sir.

152 Q. Have you been either cashier or assistant cashier of the two banks from the 7th day of April, 1906, to the present time?

A. I have.

Q. How much longer were you—When did you become assistant cashier?

A. Of the exchange bank?

Q. Yes.

A. August 1, 1902.

Q. Then were you assistant cashier from that time up to—

A. Up to the evening of the 15th of July, 1906.

Q. Do you know E. N. Gillespie, one of the complainants in this suit?

A. Yes, sir.

Q. Did he deposit any rentals in that bank?

A. Yes, sir.

Q. For whom among others?

A. James A. and Susannah Smith.

Q. Let me ask you, did he deposit them jointly or individually for the two persons?

A. Separately, two separate accounts.

Q. That is it. I hand you Exhibit 13 and ask you what that is (handing paper to witness)?

A. That is a check—

Q. Signed by whom?

A. Signed by E. N. Gillespie.

Q. And payable to whom?

A. Martinsville State Bank.

Q. Now, what was done with the money that called for?

A. It was placed to the—part of was placed to the credit—
Shall I give the amount?

Q. Yes, sir; you may refresh your memory.

A. I have the original deposit ticket here.

Q. Well, if you can give that—

A. To refresh my memory on that (witness examines paper).
Two fifty was placed to the credit of James A. Smith and Eleven
twenty-six was placed to the credit of Susannah Smith in the
Exchange Bank May 11, 1907.

Q. I will ask you if these deposits were made on the day these
tickets bear date?

A. Yes, sir; they were.

The MASTER: Better identify those tickets.

Q. I will ask you if the deposits indicated by Exhibits 14 and 15
were deposited the day said tickets bear date?

153 A. Yes, sir.

Q. Has that money been there during that time up to
the present?

A. It has.

Q. Has that money been there during that time up to the present?

A. It has.

Q. And the respective parties, Susannah Smith and James A.
Smith, could have received the money if they had called for it?

A. Yes, sir; by giving a check for such sum, they could have
had the cash at any time.

Q. I now hand you Exhibit 16 and ask you what that is (hand-
ing paper to witness)?

A. Check signed—on the Farmers' and Producers Bank of Rob-
inson, Illinois, signed E. N. Gillespie, payable to the order of the
Martinsville State Bank, Martinsville, Illinois, for \$36.88.

Q. Did you get the money on that check?

A. Yes, sir.

Q. What did you do with it as regards the matter in controversy?

A. We placed it to the credit of James A. Smith, \$1.25, and to
the credit of Susannah Smith, \$5.63 on August 2, 1907.

Q. In receiving these checks, various checks, were there any let-
ters of instructions with them?

A. They were accompanied by a letter advising us—

Mr. SIMMONS: No, no, no; we object.

The MASTER: Well, I think the answer is proper, advising him
what to do.

Exception by defendant.

Q. Where are those letters, where is each letter?

A. They were burned up, thrown in the waste basket, we don't
keep such letters as that.

Q. When did you destroy the letters?

A. Well, I suppose on the same day, I couldn't state about that it might have been that day or the next day; they were thrown in the waste basket the day they were received and this placed to the credit, and we burn the basket when it gets full, so I don't know just what date it was.

Q. Did you destroy either of these letters?

A. Destroyed them for the purpose of getting them out of the road, because we don't consider letters like that of any
154 importance after they have conveyed to us what they were to convey to us, so they are just destroyed.

Q. Then I will ask you if you destroyed them to avoid having them here as evidence in this case?

A. No, sir; didn't know this case was going to be.

Q. I now hand you Exhibit 19 and ask you what that is (handing paper to witness).

A. This is a check on the First National Bank of Cameron, West Virginia, signed by E. N. Gillespie, pay to the order of Martinsville State Bank, Martinsville, Illinois, \$21.88.

Q. I now hand you Exhibit- 20 and 21 and ask you what they are (handing papers to witness)?

A. Original deposit tickets showing that we have placed to the credit on November 21, 1907, to the credit of James A. Smith \$1.25 and to the credit of Susannah Smith on the same date, November 26, 1907, \$5.63 out of this check.

Q. Now, I will ask you if you have a deposit slip for any rent payable at a subsequent time, and if so when?

A. We have several. The next one is February 17, 1908.

Q. Well, let me have those.

(Witness hands papers to attorney.)

Q. I am now handing you Exhibits 22 and 23, and ask you what they are?

A. Those are the original deposit tickets which show we have placed to the credit of Susannah Smith on February 17, 1908, \$5.63

Q. Did you deposit this to her credit on that date?

A. Yes, sir.

Q. And to the credit of James A. Smith \$1.25. Did you deposit that to his credit on that day?

A. Yes, sir.

Q. Do you know how the last credit bearing date February 17, 1908, was paid?

A. It was paid by a check on one of the Robinson banks; I won't say what bank. Our remittance sheet shows it was paid by a check on one of the Robinson banks, signed by E. N. Gillespie.

Q. Do you know where the check is?

A. I do not know where the check is.

Q. I now hand you Exhibit 24 and ask you what that is.

A. Check on the Crawford County State Bank, Robinson, Illinois signed E. N. Gillespie, "Pay to the order of Martinsville State Bank, Martinsville, Illinois, \$36.88."

155 Q. Now, did you deposit any money to the credit of the Smiths, from this check?

A. On May 11, 1908, we placed to the credit of James A. Smith and to the credit of Susannah Smith, \$5.63.

Q. I now hand you Exhibits 25 and 26 and ask you what they are (handing papers to witness)?

A. The original deposit tickets showing that we placed to the credit of James A. Smith on May 11th \$1.25 and to the credit of Susannah Smith on the same date \$5.63.

Q. I now hand you Exhibit No. 27 and ask you what that is (handing paper to witness)?

A. Check on the Bank of Cameron, West Virginia, signed by E. N. Gillespie, "pay to the order of Martinsville State Bank, Martinsville, Illinois, \$36.88."

Q. Did you get the money on that check?

A. Yes, sir.

Q. Did you deposit that money, any of that money, to the credit of either of these defendants in these cases?

A. I did.

Q. I now hand you Exhibits 28 and 29, and ask you what they are? (Handing papers to witness)?

A. Exhibit 28 is a copy of the original ticket, deposit ticket, where we placed to the credit of Susannah Smith out of that check, \$5.63; 29 is a copy of the original ticket where we placed to the credit of James A. Smith \$1.25 out of that money.

Q. Is each an exact and true copy?

A. Each is an exact and true copy of the original.

Q. Was that money deposited to the credit of—Were those respective amounts placed to the credit of James A. Smith and Susannah Smith on August 7th, 1908?

A. Yes, on August 7, 1908.

Q. I now hand you Exhibit No. 30 and ask you what that is (handing paper to witness)?

A. Check on the Crawford State Bank, Robinson, Illinois, signed by W. H. Lancashire, payable to the order of Martinsville State Bank, of Martinville, Illinois, for \$21.68.

Q. Did you get a letter of instructions accompanying that check?

A. Letter of instructions came with it stating that it was—

Mr. SIMMONS: No, no, no.

Q. Have you got that letter?

A. No, sir.

156 Mr. LOWE: They were all destroyed, he testified, Mr. Simmons.

Mr. SIMMONS: I know, but that doesn't—

Mr. LOWE: All right, we will go through it in the regular way.

Q. Where is that letter, Mr. Sinclair?

A. Destroyed.

Q. When was it destroyed?

Mr. SIMMONS: Well, I am not objecting—I don't want him to

give the contents of the letter, but that it gave him instructions how to place the money, we are not objecting to that.

Q. Well, did that letter instruct you what to do with the money?

A. Yes, sir.

Q. And what was that letter of instruction as to the Smiths?

Mr. SIMMONS: Well, now wait; I don't think that is proper.

The MASTER: Who was the letter from?

Mr. SIMMONS: Gillespie, I reckon.

Q. Well, I will ask you, Mr. Witness, where is the letter that accompanied that check?

A. Destroyed.

Q. When was it destroyed?

A. I can't say; I suppose about at the time I received this.

Q. Did you destroy that letter so that you could not have it here as evidence?

A. Yes.

Q. You destroyed it so you couldn't have it here?

A. Oh, no, not for that purpose.

Q. Now, you may state whether or not that letter contained instructions as to the making of these deposits?

A. Yes, sir; it did. It instructed us to place so much of this to the credit of James A. Smith and a certain amount to Susannah Smith.

Q. I now hand you Exhibits 31 and 32, and ask you what they are (handing papers to witness)?

A. 31 is a copy of the original deposit ticket showing the placing to the credit of Susannah Smith on November 27, 1908, \$5.63.

Q. And what is the other?

A. And No. 32 is a copy of the original deposit ticket showing we placed to the credit of James A. Smith on November 27, 1908, \$1.25.

157 Q. Did you place them to their respective credits on those respective dates?

A. We did.

Q. I now hand you Exhibit 33 and ask you what that is (handing paper to witness)?

A. Check Farmers & Producers Bank Robinson, Illinois, signed by E. N. Gillespie, "pay to the order of State Bank, Martinsville, Illinois, \$36.88."

Q. Was there any letter accompanying that check with instructions what to do?

A. There was.

Q. What was that instruction as to the Smiths?

A. Instructed us to place to the credit of James A. Smith \$1.25 and to the credit of Susannah Smith \$5.63.

Q. Did you do that?

A. We did.

Q. On what date?

A. February 3, 1809.

Q. Has there been any other credits made there, payments made?

A. Yes, sir.

Q. I hand you Exhibits 34 and 35 and ask you what they are (handing papers to witness)?

A. 34 is a copy of the original deposit ticket where we placed to the credit of Susannah Smith, February 3, 1909, \$5.63; 35 is a copy of the original deposit ticket showing we placed to the credit of James A. Smith on February 3, 1909, \$1.25.

Q. And you stated a while ago those credits were placed to the respective credits of James A. Smith and Susannah Smith of February 3, 1909?

A. Yes, sir; I stated that.

Q. Has there any other credit been made there?

A. Yes, sir; one.

Q. How did you get the money to pay—to make these deposits with?

A. I am not able to state that; I don't remember. It may have come in a check. My memory does not serve me correctly on that; it may have been paid in cash.

Q. I now hand you Exhibits 36 and 37 and ask you what they are (handing papers to witness)?

A. 36 is a copy of the original deposit ticket showing that we placed to the credit of Susannah Smith May 14, 1909, \$5.63 left by Gillespie, or some of his agents, either in cash or by check through the mail; I am not able to state now.

Q. And what is Exhibit No. 37?

A. Copy of the original deposit ticket showing that on May 14, 1909, we placed to the credit of James A. Smith \$1.25 left by E. N. Gillespie.

Q. And did you place these respective amounts to the credit of Susannah Smith and James A. Smith on May 14, 1909?

A. Yes, sir.

Q. At the direction of whom?

A. E. N. Gillespie.

Q. You don't know how that was made?

A. No, I couldn't state how it was made. It may have been made while I was absent from the Bank I don't just remember.

Q. I now hand you Exhibit 38 and ask you what that is (handing paper to witness):

A. That is the original sheet of our looseleaf individual ledger showing the account as kept for James A. Smith and Susannah Smith.

Q. Now, just a moment, I am asking you now specifically as to Exhibit 38.

A. Well, that is the account of Susannah Smith.

Q. That's it.

A. The original sheet from the looseleaf ledger.

Q. This is the original sheet?

A. This is the original sheet.

Q. I will ask you if the respective dates and amounts shown on there were deposited and credited as given on that sheet?

A. Yes, sir.

Q. At the identical date of each one mentioned there?

A. Ask that again.

Q. I want to know if these deposits were made, if these entries were made at the identical dates given here?

A. Yes, sir.

Q. In each case?

A. Yes, sir.

Q. Now, I ask you what Exhibit 39 is (handing paper to witness).

A. The account—shows the account of James A. Smith on the original sheet of our looseleaf individual ledger.

159 Q. Were each one of those entries entered on the sheet there at the time indicated on the sheet or given on the sheet?

A. Yes, sir.

Q. This is the original entry?

A. This is the original sheet containing the entries.

Mr. LOWE: I now offer in evidence the Exhibits from 10 to 39 both inclusive.

Counsel for Complainant offered in evidence Complainants' Exhibits 13, 14 and 15, copies of which said Exhibits are as follows:

(EXHIBIT 13.)

Exhibit 13—Check, Date May 7, 1907.

CAMERON, W. VA., May 7, 1907. No. 677.

The First National Bank.

Pay to The Martinsville State Bank or order \$13.76 Thirteen and 70/100 Dollars.

E. N. GILLESPIE.

(Stamped across the face:) Paid May 21 1907 First National Bank, Cameron, W. Va.

(On the back of which said Exhibit appears the following endorsements:)

Previous endorsements guaranteed.

Pay First National Bank, Terre Haute, Ind. or order
Martinsville State Bank,
Martinsville, Ill.

F. H. Sinclair, Cashier.

Previous endorsements guaranteed

Pay to the order of any Bank, Banker, Bankers or Trust Co.

First National Bank,
Terre Haute, Indiana

B. McCormick, Cashier.

Pay to any Bank or Banker, or order.

Previous endorsements guaranteed

May 16, 1907

Merchants Nat'l Bank.

Baltimore Md.

Wm. Ingle, Cashier.

Pay to the order of any Bank or Banker,

All prior endorsements guaranteed

May 18, 1907 City Bank of Wheeling, Wheeling W. Va.

R. C. Dalzell, Cashier.

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(EXHIBIT 14.)

Exhibit 14—Deposit Slip.

Exchange Bank of Hammond & Sallee.

Deposited by Susannah Smith, Martinsville, Ill., May 11, 1907.

Checks as follows:

E. N. Gillespie	11.26
Total	<u>\$11.26</u>

(EXHIBIT 15.)

Exhibit 15—Deposit Slip.

Exchange Bank of Hammond & Sallee.

Deposited by James A. Smith, Martinsville, Ill., May 11, 1907.

Checks as follows:

E. K. Gillespie	2.50
Total	<u>\$2.50</u>

Counsel for complainants offered in evidence Complainants' Exhibits 16, 17 and 18.

Copies of which exhibits are as follows:

COMPLAINANTS' EXHIBIT 16.

Exhibit 16—Check, Date July 31, 1907.

ROBINSON, ILLS., July 31, 1907. No. 49.

The Farmers & Producers Bank.

Pay to the order of State Bank, Martinsville, Ill. \$36.88 Thirty-six and 88/100 Dollars.

For Rentals.

Spraker	15.00
Jas. A. Smith	1.25
Susannah "	5.63
F. Low	15.00

E. N. GILLESPIE.

161 On the back of which appear the following endorsements:

Pay to the Order of
First National Bank
Chicago,
Martinsville State Bank
Fred H. Sinclair, Cashier.
Pay to the order of
First National Bank,
All Prior endorsements guaranteed,
First National Bank, Chicago
Aug. 3, 1907
G. N. Gillett, Cashier.
Paid
Aug. 5, 1907
The First National Bank,
Robinson, Ill.
Paid
Aug. 5, 1907
The Farmers & Producers Bank,
Robinson, Ills.

Exhibit 17—Deposit Slip.

COMPLAINANTS' EXHIBIT 17.

Exchange Bank of Hammond & Sallee.

Deposited by Susannah Smith, Martinsville, Ill., Aug. 2, 1907.

Please list each check separately.

Currency	
Silver	
Gold	

Checks as follows:

E. N. Gillespie	5.63
Total	<u>\$5.63</u>

See that all checks and drafts are endorsed.

162

Exhibit 18—Deposit Slip.

COMPLAINANTS' EXHIBIT 18.

Exchange Bank of Hammond & Sallee.

Deposited by James A. Smith, Martinsville, Ill., Aug. 2, 1907.

Please list each check separately.

Currency	
Silver	
Gold	

Checks as follows:

E. N. Gillespie	1.25
Total	<u>\$1.25</u>

See that all checks and drafts are endorsed.

Counsel for complainants offered in evidence Complainants' Exhibits 19, 20 and 21.

Copies of which said exhibits are as follows:

Exhibit 19—Check, Date Nov. 19, 1907.

COMPLAINANTS' EXHIBIT 19.

CAMERON, W. VA., Nov. 19, 1907. No. 1085.

Pay to the order of State Bank, Martinsville, Ill., \$21.88 Twenty-one and 88/100 Dollars.

To the First National Bank, Cameron, W. Va.

E. N. GILLESPIE.

On the back of which appear the following endorsements:

Pay to Columbia National Bank
Pittsburgh, Pa., or Order,
All Prior Endorsements Guaranteed,
Martinsville State Bank,
Martinsville, Ill.
Pay Any Bank Or Banker
Or Order
All Prior Endorsements Guaranteed
Columbia National Bank,
Pittsburgh, Pa.
W. C. Lowrie, Cashier.

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Exhibit 20—Deposit Slip.

COMPLAINANTS' EXHIBIT 20.

Exchange Bank of Hammond & Sallee.

Deposited by Susannah Smith, Martinsville, Ill., Nov. 21, 1907.

Please list each check separately.

Currency	
Silver	
Gold	

Checks as follows:

E. N. Gillespie.....	5.63
Total	\$5.63

See that all checks and drafts are endorsed.

Exhibit 21—Deposit Slip.

COMPLAINANTS' EXHIBIT 21.

Exchange Bank of Hammond & Sallee.

Deposited by Jas. A. Smith, Martinsville, Ill., Nov. 21, 1907.

Please list each check separately.

Currency	
Silver	
Gold	

Checks as follows:

E. N. Gillespie.....	1.25
Total	\$1.25

See that all checks and drafts are endorsed.

Counsel for complainant- offered in evidence Complainants' Exhibits 22 and 23.

Copies of which said exhibits are as follows:

164

Exhibit 22—Deposit Slip.

COMPLAINANTS' EXHIBIT 22.

Exchange Bank of Hammond & Sallee.

Deposited by Susannah Smith, Martinsville, Ill., Feb. 17, 1908.

Please list each check separately.

Currency	
Silver	
Gold	

Checks as follows:

E. N. Gillespie	5.63
Rental	
Total	<u>\$5.63</u>

See that all checks and drafts are endorsed.

Exhibit 23—Deposit Slip.

COMPLAINANTS' EXHIBIT 23.

Exchange Bank of Hammond & Sallee.

Deposited by Jas. A. Smith, Martinsville, Ill., Feb. 17, 1908.

Please list each check separately.

Currency	
Silver	
Gold	

Checks as follows:

E. N. Gillespie	1.25
Rental	
Total	<u>\$1.25</u>

Counsel for complainants offered in evidence Complainants' Exhibits 24, 25 and 26.

Copies of which said exhibit are as follows:

165

Exhibit 24—Check, Date May 2, 1908.

COMPLAINANTS' EXHIBIT 24.

ROBINSON, ILL., May 2, 1908. No. 173.

Crawford County State Bank.

Pay to State Bank, Martinsville, Ill. or order \$36.88 Thirty-six and 88/100 Dollars.

For Rentals.

E. N. GILLESPIE.

On the back of which appear the following endorsements:

Pay
 3rd National Bank
 of St. Louis,
 or order,
 Martinsville State Bank,
 Martinsville, Ill.,
 Fred H. Sinclair, Cashier.
 Pay to the order of
 Any Bank or Banker,
 First National Bank
 Robinson, Ill.
 C. H. Steel, Cashier.
 Pay to the Order of
 Any Bank or Banker,
 Previous endorsements guaranteed,
 May 12 1908
 3rd National Bank of
 St. Louis, Mo.
 G. W. Galbreath, Cashier.

166

Exhibit 25—Deposit Slip.

COMPLAINANTS' EXHIBIT 25.

Exchange Bank of Hammond & Sallee.

Deposited by Susannah Smith, Martinsville, Ill., May 11, 1908.

Please list each check separately.

Currency
 Silver
 Gold

Checks as follows:

E. N. Gillespie	5.63
Total	<u>\$5.63</u>

See that all checks and drafts are endorsed.

Exhibit 26—Deposit Slip.

COMPLAINANTS' EXHIBIT 26.

Exchange Bank of Hammond & Sallee.

Deposited by James A. Smith, Martinsville, Ill., May 11, 1908.

Please list each check separately.

Currency
 Silver
 Gold

Checks as follows:

E. N. Gillespie	1.25
Total	<u>\$1.25</u>

See that all checks and drafts are endorsed.

Counsel for complainants offered in evidence Complainants' Exhibits 27, 28 and 29.

Copies of which said exhibits are as follows:

167 *Exhibit 27—Check, Date July 24, 1908.*

COMPLAINANTS' EXHIBIT 27.

E. N. Gillespie, Robinson, Ill.

CAMERON, W. VA., July 24, 1908. No. 121.

Pay to the order of State Bank, Martinsville, Ill. \$36.88 Thirty-six and 88/100 Dollars.

For Aug. Rentals.

To the Bank of Cameron, Cameron, W. Va.

E. N. GILLESPIE.

On the back of which appear the following endorsements:

Previous Endorsements guaranteed

Pay First National Bank

Terre Haute, Ind., or order

Martinsville State Bank

Martinsville, Ill.

F. H. Sinclair, Cashier.

(Previous endorsements guaranteed)

Pay To The Order Of

Any Bank, Banker, Bankers or Trust Co.

First National Bank

B. McCormick, Cashier.

First National Bank

Cameron, W. Va.

Another endorsement dated August 10th, — which is unintelligible.

Exhibit 28—Deposit Slip.

COMPLAINANTS' EXHIBIT 28.

Deposited in the Martinsville State Bank, Martinsville, Ill., by
Susannah Smith, Aug. 7, 1908.

Please list each check separately.

	Dollars.	Cents.
Currency		
Gold		
Silver		
Checks		
E. N. Gillespie		5.63
Total	\$5.63	

See that all checks and drafts are endorsed.

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Exhibit 29—Deposit Slip.

COMPLAINANTS' EXHIBIT 29.

Deposited in the Martinsville State Bank, Martinsville, Ill., by
James A. Smith, Aug. 7, 1908.

	Dollars.	Cents
Currency		
Gold		
Silver		
Checks		
E. N. Gillespie		1.25
Total	\$1.25	

See that all checks and drafts are endorsed.

Exhibit 28—Deposit Slip.

COMPLAINANTS' EXHIBIT 28.

Deposited in the Martinsville State Bank, Martinsville, Ill., by
Susannah Smith, Aug. 7, 1908.

Please list each check separately.

	Dollars.	Cents
Currency		
Gold		
Silver		
Checks		
E. N. Gillespie		5.63
Total	\$5.63	

See that all checks and drafts are endorsed.

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Exhibit 29—Deposit Slip.

COMPLAINANTS' EXHIBIT 29.

Deposited in the Martinsville State Bank, Martinsville, Ill., by
James A. Smith, Aug. 7, 1908.

	Dollars.	Cents
Currency		
Gold		
Silver		
Checks		
E. N. Gillespie	1	25
Total	\$1	25

See that all checks and drafts are endorsed.

Counsel for complainants offered in evidence Complainants' Exhibits 30, 31 and 32.

Copies of which said exhibits are as follows:

Exhibit 30—Check, Date Nov. 30, 1908.

COMPLAINANTS' EXHIBITS 30.

ROBINSON, ILL., Nov. 30, 1908. No. 138.

Crawford County State Bank.

Pay to State Bank, Martinsville, Ill. or order, \$21.88 Twenty-one & 88/100 Dollars.
For Rentals.

W. H. LANCASHIRE.

(Stamped on the face:) 5 M 5.

Also:

Crawford County State Bank
Paid Nov. 30 1908
Robinson, Ill.

On the back of which said check appear the following endorsements:

Pay to the Order of
Any Bank or Banker,
First National Bank
—, Ill.
C. H. Steel, Cashier.
Pay to the order of
First National Bank
Chicago,
Martinsville State Bank
Fred H. Sinclair, Cashier.
Pay to the order of First National Bank,
All prior endorsements guaranteed
First National Bank, Chicago,
Nov. 28, 1908
C. N. Gillett, Cashier.

Exhibit 31—Deposit Slip.

COMPLAINANTS' EXHIBIT 31.

Deposited in the Martinsville State Bank, Martinsville, Ill., by
Susannah Smith, Nov. 27, 1908.

Please list each check separately.

	Dollars.	Cents
Currency		
Gold		
Silver		
Checks		
E. N. Gillespie	5.	63
Total	\$5.	63

See that all checks and drafts are endorsed.

Exhibit 32—Deposit Slip.

COMPLAINANTS' EXHIBIT 32.

Deposited in the Martinsville State Bank, Martinsville, Ill., by
James A. Smith, Nov. 27, 1908.

	Dollars.	Cents
Currency		
Gold		
Silver		
Checks		
E. N. Gillespie	1.	25
Total	\$1.	25

See that all checks and drafts are endorsed.

Counsel for complainants offered in evidence Complainants' Exhibits 33, 34 and 35.

Copies of which said exhibits are as follows:

Exhibit 33—Check Dated Jan. 26, 1909.

COMPLAINANTS' EXHIBIT 33.

E. N. Gillespie.

ROBINSON, ILLINOIS, Jan. 26, 1909. No. 306.

Pay to the order of State Bank, Martinsville, Ill. \$36 88/100
Thirty-six and 88-100 Dollars.

For Rental. (Stamped on face:) "9 M. 9."

To Farmers & Producers Bank, Robinson, Illinois.

E. N. GILLESPIE.

On the back of which said exhibit appears the following endorsements:

172

Pay to the order of
First National Bank
Chicago.Martinsville State Bank,
Fred H. Sinclair, Cashier.Pay to the order of
Any Bank or Banker,
First National Bank,
Robinson, Ill.

C. H. Steel, Cashier.

Pay to the order of
First National BankAll Prior Endorsements Guaranteed,
First National Bank, Chicago.

Feb. 4, 1909.

C. N. Gillett, Cashier.

Paid

Feb. 5 1909

The Farmers & Producers Bank
Robinson, Ills.*Exhibit 34—Deposit Slip.*

COMPLAINANTS' EXHIBIT 34.

Deposited in the Martinsville State Bank, Martinsville, Ill., by
Susannah Smith, Feb. 3, 1909.

Please list each check separately.

	Dollars.	Cents
Currency		
Gold		
Silver		
Checks		
En N. Gillespie	\$5.	63
Total	\$5.	63

See that all checks and drafts are endorsed.

Counsel for complainants introduced in evidence complainants' Exhibits 36 and 37.

Copies of which said exhibits are as follows:

173

Exhibit 36—Deposit Slip.

COMPLAINANTS' EXHIBIT 36.

Deposited in the Martinsville State Bank, Martinsville, Ill., by
Susannah Smith, May 14, 1909.

Please list each check separately.

	Dollars.	Cents
Currency		
Gold		
Silver		
Checks		
E. N. Gillespie		5.63
Total	\$5.63	

See that all checks and drafts are endorsed.

Exhibit 37—Deposit Slip.

COMPLAINANTS' EXHIBIT 37.

Deposited in the Martinsville State Bank, Martinsville, Ill., by
James A. Smith, May 14, 1909.

Please list each check separately.

	Dollars.	Cents
Currency		
Gold		
Silver		
Checks		
E. N. Gillespie		1.25
Total	\$1.25	

See that all checks and drafts are endorsed.

Counsel for complainants offered in evidence Complainants' Exhibit 38.

A copy of which said exhibit is as follows:

Exhibit 38—Statement "Offered."

174 "Martinsville State Bank Successor to Exchange Bank,
Martinsville.

No. —.

Sheet No. —.

Name, Susannah Smith.

Address, —.

Date.	Checks.	Deposits.	Dr. Balance.	Cr. Balance.
1906.				
July 16. Bal.....	22.50	....	22.50
1907.				
May 13.	11.26	....	33.76
Aug. 2.	5.63	....	39.39
Nov. 21.	5.63	....	45.02
1908.				
Feb. 17.	5.63	....	50.65
May 11.	5.63	....	56.28
Aug. 7.	5.63	....	61.91
Nov. 27.	5.63	....	67.54
1909.				
Feb. 3.	5.63	....	73.17
May 14.	5.63	....	78.80

Counsel for complainants offered in evidence Complainants' Exhibit 39.

A copy of which said exhibit is as follows:

Exhibit 39—Statement "Offered."

"Martinsville State Bank, Successor to Exchange Bank, Martinsville.

No. —.

Sheet No. —.

Name, James A. Smith.

Address, —.

Date.	Checks.	Deposits.	Dr. balance.	Cr. balance.
1906.				
July 16. Bal.....	5.	....	5.
1907.				
May 13.	2.50	....	7.50
Aug. 2.	1.25	....	8.75
Nov. 21.	1.25	....	10.
1908.				
Feb. 17.	1.25	....	11.25
May 11.	1.25	....	12.50
Aug. 7.	1.25	....	13.75
Nov. 27.	1.25	....	15.00
1909.				
Feb. 3.	1.25	....	16.25
May 14.	1.25	....	17.50

175 Q. I will now ask you, Mr. Sinclair, what each one of these respective credits were placed to the credit of Susannah Smith for, in payment of what?

A. In payment of oil and gas rental.

Q. On lease owned by whom?

A. E. N. Gillespie.

Q. And what is each one of the credits paid and given there to James A. Smith for, in payment of what?

A. Oil and gas rental on the land in Crawford County by E. N. Gillespie, owned by E. N. Gillespie.

Q. The lease or land owned by E. N. Gillespie?

A. The lease.

Q. The lease to E. N. Gillespie and the land is owned by whom?

A. James A. Smith owns the land.

Q. I will ask you, Mr. Sinclair if Susannah Smith could have gotten the money due her any time she would have called for it and given a check?

A. Yes, sir.

Q. Could James A. Smith have received the money due him at any time he would have called and given a check for it?

A. Yes, sir.

Mr. LOWE: Take the witness.

Cross-examination by Mr. HINDMAN:

Q. How long have you been connected with that bank either as Cashier or assistant cashier?

A. Which bank do you mean? You say that bank, you mean either of the banks, or do you consider the banks all one?

Q. Have you been testifying about more than one bank?

A. No, sir.

Q. Well—

A. The one succeeded the other; there was practically no change; since August 1, 1902, I have been connected with the bank.

Q. You have brought with you here a leaf out of your individual ledger which you say is original, contains the original entry?

A. Yes, sir; that is the original sheet from the looseleaf individual ledger.

Q. And the entries were made as shown on this sheet at the time they were made?

A. Yes, sir.

176 Q. When did the Martinsville State Bank succeed the Exchange Bank at Martinsville?

A. The morning—at the opening of the office on July 16, 1906.

Q. July 16, 1906?

A. Yes, sir; at which time all the balance shown to the credits of the different depositors in the Exchange bank were transferred to the new bank, the Martinsville State Bank.

Q. Yes. I see here the first entry on Exhibit No. 39 is July 16, balance \$5.

A. That is the balance credited forward; that is a credit forwarded from—

Q. This money was not deposited at that time?

A. No, that money—No, that was just simply——

Q. You just simply credited it forward from some other loose-leaf?

A. That is in red ink, isn't it?

Q. Yes.

A. That is credited forward from the leaf that the Judge produced a while ago in his evidence.

Q. But why didn't you bring the original looseleaf that contained that?

A. The original looseleaves—the old binding that we had in the Exchange bank—we had the one binder and we used it for the new one and we took the old leaves and put a back around them and put some large bolts through them. We didn't figure on anything like this at the time and we have them all bolted together, and be rather a cumbersome affair, and besides I didn't consider—I was not instructed to bring anything like that, and so I just brought the copy.

Q. You brought the looseleaf containing the entries?

A. Yes, sir.

Q. About which you knew there was no dispute whatever?

A. About which I had to testify. That is where my—I didn't get into the thing, you see, until that time and that shows the balance credited forward from the other sheet. You notice it is in red ink; that means we start off with that much.

Q. Yes, I know what it means exactly. You were instructed to bring this sheet, were you?

A. I think so, after I came up here the other time, May 10th, when we didn't have anything to do.

Q. Yes, containing the deposits that were made May 13th?

177 A. Yes, sir.

Q. 1907?

A. Yes, sir. We thought we could get along without that——

Q. This leaf does not contain any of the original entries that were made prior to the year 1907?

A. No, I think not; you can tell by looking at——

Q. You were not instructed to bring anything only the looseleaf containing the entries of 1907?

A. I think not. The other one was bound together as I stated and we thought we could get along without it.

Q. Well, weren't you instructed and didn't you know that there was no dispute at all about these entries that are shown on this Exhibit, the balance here?

A. Well, no——

Mr. LOWE: Just a moment. You don't contend, you don't deny that in your answer?

Mr. HINDMAN: Well, I don't know whether we did or not.

Q. How big is that book that contains the original entry of the deposit that is shown here simply as balance?

A. Well, it would be a book about—I suppose about five inches

thick and possibly fourteen inches long; I believe the sheets are eleven by thirteen. It is a book; that is a sheet out of the book, it would be that big and it is about five inches thick, or a little more. That is 11 by 13, I think; I don't know for sure; it is about that. That is the size of the book and then it is about five inches thick and bolted together.

Q. And your reason for not bringing it was because of its weight and cumbersomeness?

A. Yes, sir; bothersome. I couldn't get it in my suitcase, and then I didn't think it was necessary anyhow; I didn't know that it would be necessary anyhow. My instructions to bring these with me were written and were very indefinite, and I really didn't know what to bring.

Q. These entries are in your handwriting?

A. Part of them; I could show you the ones that are in my handwriting.

Q. Who made the other entries that are not in your handwriting?

A. Mr. E. L. Shinkel. He is at present time assistant cashier of the bank and was at the time the entries were made and has been since the organization of the State Bank.

Q. Was he connected with the bank prior to the reorganization of it?

A. Not in an official capacity. The 24th day of June, 178 1906, when Judge Gassaway went to the Springs for his health, Mr. Shinkel had just returned from California, and being acquainted there we got him to help us out in the bank. He was not working there in an official way, just helping me out.

Q. Who attended to the correspondence, answering letters of inquiry concerning deposits that came to the bank by persons who had credits and accounts in that bank?

A. Sometimes I did; and sometimes either of the assistant cashiers; we have two assistant cashiers; sometimes I attend to that and sometimes either of them.

Q. Now, this man Smith, James A. Smith, had only one account in your bank?

A. One account, sir.

Mr. LOWE: Well, your Honor, I object to these questions and in order to preserve the record I object to the question and ask to have the answer excluded because it is immaterial and wholly irrelevant.

The MASTER: Have only one account?

Mr. LOWE: Yes. The purpose of counsel is to show that this is all that he has got there. I think it is immaterial, because he created this himself.

The MASTER: Well, the answer may stand; go ahead.
Exception by complainants.

Q. Are you acquainted with James A. Smith?

A. Slightly; I know him when I see him.

Q. When did you first see him?

A. I can't state positively.

Q. Did he ever call at your bank?

A. Once to my recollection, and once——

Q. When was that?

Mr. LOWE: Now, wait a moment. Let him tell about that. Go ahead and tell.

Mr. SIMMONS: No, he has answered the question.

Mr. LOWE: Well, he was going to explain.

Mr. HINDMAN: We don't need any explanation; we are not asking for any explanation.

The MASTER: Well, go ahead; he answered the question; you can bring it out if it is material.

Q. When was that?

A. I can't state the date.

Q. Can you approximately give the date?

A. Well, it was sometime between July 16 and the present time; that is about as close as I would want to come to it.

Q. It was not day before yesterday?

79 A. No, sir. Oh, to guess at it, I think I would be safe in saying it was more than a year ago, something like that.

Q. Well, then you can get a little closer to it than what you said a while ago?

A. Oh, just a little bit; I wouldn't want to state with any degree of closeness because I couldn't remember; I remember of him being there, but I couldn't tell—I don't know that I can state much closer than a year, not hardly that close.

Q. What was the occasion of his visit to your bank?

A. His business as he told it was—he come into the bank and wanted to cash a check on one of the Casey banks. That was his business in the bank, he wanted to get the money on a Casey bank; I don't remember whether it was his own personal check or he had a check someone else had given him. I stepped to the counter and——

Q. Now, I am not asking you about what you did. You must give some limit to your answer.

A. All right; his business in the bank was to see about cashing a check.

Q. Well now, you have told that?

A. All right.

Q. Did he ask anything about any deposits made by Gillespie to his credit?

A. Not to my recollection.

Q. Do you think a thing of that kind could have occurred without your remembering it?

A. Well, yes, it might; we have lots of things to try to remember in a place like that.

Q. If he had made inquiry concerning his account or whether there had been any money left there for him, could you not have readily ascertained whether that was true or not?

A. Oh, yes, I could have told him if he had asked about it.

Q. Yes. Was anybody with Mr. Smith at the time he was there?

A. Mr. Smith came in by himself but I was not acquainted with him and I sent him out to get somebody and——

Q. No, I am not asking you that. Read the question to the witness.

(Question read.)

A. No, when he first came in there was a few minutes——

Q. No, that can be answered yes, or no.

The MASTER: Well, he has answered it. He says there was not when he first came in, but there was afterward.

180 Q. Who was it that was with him?

A. I would say no then if you want to get that.

Q. Well, then, if your answer is no then of course the other question would not be very definite; we are not asking for a discourse. I simply asked for an answer, that is all.

The WITNESS: All right, I will make it as brief as I can.

Q. Was there at any time while he was in the bank anybody in there with him?

A. Yes, sir.

Q. Who?

A. A man by the name of Brandt.

Q. Brandt?

A. Brandt.

Q. Was there any conversation had with you or between you and James A. Smith while this man was present?

A. I had a conversation with Smith but I don't remember whether the man stepped out out before I had the conversation with Smith or not; I couldn't state positively as to that.

Q. Did you ever receive a letter from Mr. Smith making inquiry in relation to this deposit?

A. I never did.

Q. Did the bank to your knowledge receive such a letter?

A. No, sir; the bank never did.

Q. Or any employe of your bank write to Mr. Smith on the stationery of that bank in relation to this deposit?

A. Not to my knowledge.

Q. Over the name of the Exchange bank?

A. Not to my knowledge.

Q. Were you called up by telephone at any time in relation to this——

A. I was not.

Q. Do you know Mr. Wilcox?

A. I do not.

Q. Did you have any conversation with Mr. Wilcox over the telephone——

A. Never.

Q. In relation to this deposit?

A. Never did.

Q. Do you know Mr. Allison?

A. Don't know Mr. Allison.

Q. I will ask you if Mr. Wilcox didn't call up that bank in person and make inquiry of you concerning this deposit?

181 A. If he did, I did not——

Mr. LOWE: Now, just a moment. We object, your Honor. If it is for the purpose of impeaching this witness we want the time and place fixed.

The MASTER: Well he can answer whether he made inquiry or not.

Exception by complainant.

A. He did not.

Q. Are you acquainted with Mr. Allison?

A. I am not.

Q. Did you have a conversation with Mr. Allison in August 1906?

A. No, sir; I did not.

Q. Over the telephone in relation to this deposit?

A. No, sir.

Q. Are you acquainted with Mr. Willett?

A. No, sir.

Q. Did you have a conversation with Mr. Willett in September 1908 over the telephone?

A. No, sir.

Q. From Robinson, Illinois, concerning this same deposit?

A. No, sir.

Q. Did you ever tell anyone up as late as September 11 1906, that no money had been left at your bank for either Mr. Smith, James A. Smith, or Susannah Smith?

A. I did not.

Mr. HINDMAN: That is all.

Redirect examination by Mr. LOWE:

Q. Now, then, you may tell the court about how Smith happened to come in by himself and then come back with somebody else?

A. Mr. Smith came into the bank; I don't remember the date; we talked about that a while ago; and as I stated he wished to cash a check on one of the Casey banks and I was not acquainted with him and asked him to go and bring someone in to identify him, which he did. He brought Mr. Brandt in, and we paid him the check; and in the course of the conversation between us I called his attention to the fact that money was there to his credit and also his mother's, left by Mr. Gillespie on the oil lease and he informed — that he knew of it. I don't remember just the words but the conversation left that information with me that he was aware of it.

182 Q. At the time this money was deposited—the first deposit was made, did you know where Susannah Smith and James A. Smith, or either of them, received their mail?

A. I did not.

Q. Have you learned since where?

A. Yes, sir.

Q. Did you ever notify them by mail of the deposit?

A. Yes, sir.

Q. You of course would not have any record of that in any way?

A. Oh, no. It might be possible that the card of advice was not

sent out each time, but I guess it was. We have a letter or card stating that so much has been placed to your credit.

Q. Were those cards returned to you?

A. Oh, no. We never see them after we mail them out.

Q. Counsel inquired about if you were instructed to bring the other book here. Let me ask you if this is not true, Mr. Sinclair, didn't we discuss the fact of the cumbersomeness of that book and we said to you to bring a copy and then if they objected to that we would ask the Master to go to Martinsville and there offer the original in evidence.

Mr. SIMMONS: Wait now, we object to that.

The MASTER: Oh, that is immaterial. Of course, if they object to the copy, why, they have a right to object.

Mr. LOWE: But they didn't do it.

The MASTER: I don't remember whether they did or not. Exception by complainants.

Q. I hand you now Exhibit 40 and ask you what it is.

A. A copy of the original account James A. Smith of the loose-leaf individual ledger of the Exchange Bank, copy of the original.

Q. Who made this?

A. I made this myself.

Q. Do you know it to be an exact copy?

A. I do.

Q. I now hand you Exhibit 41 and ask you what that is (handing paper to witness)?

A. It is a copy of the original entry of the account by us in our original ledger, Susannah Smith.

Q. By "us" who do you mean?

A. By the Exchange Bank.

Q. Who made this copy?

A. I made it myself.

183 Q. Is it an exact copy of the account?

A. It is.

Counsel for complainants offered in evidence Exhibits 40 and 41.

Mr. HINDMAN: Well, we would like to see the original.

Mr. LOWE: Well, now, we will ask the Master to go to Martinsville to take the evidence to avoid bringing that book here.

The MASTER: Well, of course, if they object to it why of course the objection will have to be sustained.

Mr. LOWE: Do you object to it?

Mr. HINDMAN: Oh, yes, we want to see the original.

Exception by complainants.

Q. I will ask you if you know of your own knowledge that on April 7th, 1906, there was deposited to the credit of James A. Smith as rental from E. N. Gillespie the sum of five dollars in the Exchange Bank of Martinsville, Illinois?

A. Yes, sir.

Q. I will ask you if you know of your own knowledge that there was on the 7th day of April, 1906, deposited to the credit of Susannah Smith in the Exchange Bank of Martinsville by E. N. Gillespie

or through his direction as rental of the Susannah Smith land the sum of \$22.50?

A. Yes, sir.

Mr. LOWE: That is all.

Re-recross-examination by Mr. HINDMAN:

Q. You say you know of your own knowledge that the deposit was made on April 7th?

A. Yes, sir.

Q. You was present at the time that deposit was made?

A. Yes, sir.

Q. Who made it?

A. The check was handed to me from Judge Gasaway and was placed so much of this to the credit of James A. Smith and Susannah Smith.

Q. Well, was Mr. Gillespie present?

A. I don't know where he got the check.

Q. Was Mr. Gillespie present?

A. Not that I remember.

Q. Was Mr. Prosser present?

A. I think not.

Q. Did the check come in by mail?

184 A. I can't say.

Q. Do you know whether that check passed through the hands of Mr. Prosser as the agent in charge of Mr. Gillespie's business?

A. No, I do not.

Q. Mr. Gillespie was present and wrote the check right there in the bank?

A. I don't remember.

Q. And this man Mr. Prosser never saw it?

A. I couldn't say as to that.

Mr. HINDMAN: That is all.

Re-redirect-examination by Mr. LOWE:

Q. Did you make the original entry crediting the account of Susannah Smith with this \$22.50 on the 7th of April, 1906, yourself?

A. I did.

Q. And did you credit the account of James A. Smith with the sum of five dollars from E. N. Gillespie on April 7, 1906, yourself?

A. I did.

Q. And that was in payment of rental due each one of Smiths?

A. I was informed that was what it was for.

Mr. LOWE: Yes, sir; that is all.

Re-re-recross-examination by Mr. HINDMAN:

Q. Was this check delivered to the bank on the day it bears date?

A. I don't know when the check was delivered to the bank, I can't say.

Q. You made the entries on the book, didn't you?

A. I made out the original deposit tickets and entered it on the book?

Q. Yes, April 7th.

A. As shown by the deposit ticket there?

Q. Yes.

A. I don't know when the check was received.

Q. Yes. Do you know whether Mr. Prosser had that check in his hands or passed through his hands on the 15th day of March?

185 Mr. LOWE: Now, to that I object, your Honor. Nothing has been stated about Prosser in any way, shape or form.

The MASTER: Let him answer the question, if he knows.

Exception by complainant.

(Question read.)

A. No, I don't.

Mr. HINDMAN: That is all.

Recess taken until 7:30 p. m.

Testimony of M. E. Harris.

Mr. M. E. HARRIS, a witness called on behalf of the complainants, being first duly sworn, was examined in chief by Mr. Lowe, and testified as follows:

Q. What is your name, occupation, age, and place of residence?

A. M. E. Harris; age, thirty-six; occupation, merchant; residence, Casey, Illinois.

Q. Where did you live on or about the 22d of May, 1905?

A. I lived northeast of Bellaire.

Q. You are familiar with the land owned in that territory by Susannah Smith and James A. Smith?

A. Yes, sir.

Q. Do you sustain any relations to them?

A. Yes, sir.

Q. What is it?

A. I married her daughter.

Q. And what relation does that make you to James A.?

A. Brother-in-law.

Q. You know of Mrs. Susannah Smith and James A. Smith each having leased their land in Crawford County, Illinois, to M. A. Walton?

A. Yes, sir; I know about it.

Q. You may just state now what you know about it.

A. Well, sometime after it was leased I was up there and they told me about leasing it.

Q. Who told you?

A. Mrs. Smith.

Q. When you speak of Mrs. Smith, who do you—

A. Susannah Smith; said she had leased her land to M. A. Wal-

ton; Mr. Pierce was down there with him and leased it. She got 25 cents, or was to get 25 cents an acre, and may be it would help pay the taxes.

186 Q. Did she speak anything about what her neighbors were getting as rentals?

A. I don't remember as she did at that time.

Q. Did she at any time?

A. Well, indeed, I couldn't say; of course, it was talked among us—I was there frequently,—about other people leasing their land, the neighbors around there; she told me about some leasing and then I would tell her of some others that was leased.

Q. And what was it she said she was to get?

A. 25 cents an acre.

Q. How often?

A. Per year.

Q. That was after she had leased?

A. Yes, sir.

Q. Did you ever hear James A. Smith talk about it?

A. Talked to him right about the same time probably on the same day.

Q. And what did he say?

A. About the same thing.

Q. Did you have any discussion with either or both of them as to subsequent leases?

A. Afterward?

Q. Yes.

A. Yes, sir.

Q. What was that?

A. That was the Wilcox lease.

Q. What did they say about that?

A. Well, they had leased to this man Wilcox and they called me up. I won't say whether it was the next day, but right away afterward any how; a few days, and I went up there and they said that Wilcox had leased their land and had come back the next day and said he had made a mistake and wanted another lease and he would return the old one; and wanted to know something about it; and they wanted to get a copy of the first one that he had taken. There was one lease that he took that he ever left them no copy at all; and also, they showed me the copy of the first lease that he had taken, that Walton had taken, and wanted to know of me what I thought about it or something to that amount, after it was leased.

Q. At the time they showed you the Walton lease did Mrs. Smith, Susannah Smith or James A. Smith, say anything that was said when the Wilcox lease was given?

187 A. Well, they showed me the Walton lease long before the Wilcox lease was given.

Q. Well, when they were discussing the Wilcox lease afterward, when they called you up there?

A. Yes, sir.

Q. Did they tell you what Wilcox said when he took the lease?

A. Yes, sir.

Q. You may tell about it.

A. She said that Mr. Wilcox said that the old lease was out, or was no good, and he would stand between her and any old lease that might arise.

Q. The first one she gave—what Wilcox lease, the first or second?

A. Well, they were both taken, one was taken one day, I think and the other the next, but one was taken, one was to be taken, in place of the first lease, and the first one returned on account of a mistake, so he claimed, so he told me.

Q. Did either Susannah Smith or James A. Smith ever talk to you anything about rental in the bank at Martinsville?

A. Yes, sir.

Q. What did they say?

A. Well, they said that the rental was past due, and they hadn't received any, and that they had wrote to the bank and there was no rental there.

Q. When was that?

A. It was in February they had wrote, 1906.

Q. Now, you have spoken of how many leases they had given on the place?

A. Three.

Q. Did each one give a lease—when one would give a lease the other gave one at the same time?

A. Each one, yes sir, would.

Q. Did they in these cases?

Mr. SIMMONS: Now, wait a minute we object to that.

Q. I will ask you if Susannah Smith gave a lease to M. A. Walton?

Mr. SIMMONS: Now, that is objected to.

A. Susannah Smith?

Q. Yes, sir.

Mr. SIMMONS: Now, we object to that.

A. She did—

188 Mr. SIMMONS: Just wait. Now, your Honor, we are objecting to that because this witness doesn't know. The lease itself will speak.

The MASTER: You proved that this morning.

Mr. LOWE: I am just now getting him to state how many leases up to this time had been given on the land.

Mr. SIMMONS: That isn't competent; you can't prove leases in that way.

The MASTER: Oh, I don't think it is material how many leases are on it.

Mr. LOWE: I am not trying to prove title in these people; I just want to show the fact that the leases were on there, is all; it is most certainly competent to do that.

The MASTER: Well, you have proved that lease.

Mr. LOWE: I have proved the Walton lease, but I want him to specify to the court how many there were.

The MASTER: Well, he can tell anything you said about it; she is a party defendant.

Exception by complainants.

Q. Did she give Walton a lease, M. A. Walton?

A. Yes, sir.

Q. Did she say she gave a lease to Wilcox?

A. Yes, sir.

Mr. SIMMONS: Now, we object, your Honor, to this leading form.

The MASTER: Yes, they are very leading.

Exception by complainants.

Q. What if anything did Mrs. Susannah Smith say about giving a lease to M. A. Walton; you may state whether she said she had given him one.

Mr. SIMMONS: Well, we object; that is the same thing over again.

The MASTER: Well who did she say she gave a lease to if she gave them to anybody?

The WITNESS: Now, if you fellows are ready for me to answer—

Mr. LOWE: Well, the court is asking you now. You may state.

A. She told me she had given a lease to M. A. Walton and what she was to get, what rental she was to get, and went and got a copy of the lease and showed it to me; that is the first lease.

Q. Well, now, go on and tell the others, any more.

A. After that she had given a lease to S. E. Wilcox and he come back the next day for another lease; said there was
189 a mistake in the first one and was to take this lease as he told her in lieu of the first lease and would return the first one that he had taken and he got another lease then she called me up over the telephone, and when I got up there she showed me this lease and told me about it and what he had said, that the first lease was out and she would stand between him and any oil—he would stand between her and any oil lease — might arise, but she says he never brought the lease back as agreed to.

Q. Now, do you know of your own personal knowledge of her ever having given any other lease?

A. Yes, sir.

Q. To whom?

A. C. E. Allison.

Q. Were you present when that lease was given?

A. Yes, sir.

Q. You may state what occurred as between Mrs. Susannah Smith and James T. Smith and C. E. Allison.

A. Well, he wanted to lease their land and they began to talk about the 60 acres, that is the homestead there and he looked at these oil leases and he said he didn't want any lease on that, that there wasn't any of them of any account.

Q. What do you mean by the oil lease or leases?

A. The one that M. A. Walton took also the ones that Wilcox took. He didn't want any lease on that; he would take a lease on

the land that was in her own name and also the land that was in James A. Smith's name, that is, the 30 acres and the 20 acres.

Q. Were the Walton leases on those different tracts of land, too?

A. Yes, sir.

Q. You may state whether or not Allison saw a copy of Walton's lease or leases?

A. I think not.

Q. Did Allison discuss the Walton lease any?

A. Yes, sir.

Q. Well, you may state whether or not Allison discussed the Walton leases.

Mr. SIMMONS: Now, your Honor, I object to that as wholly irrelevant and immaterial on the part of Mr. Willetts and Little.

The MASTER: Is Allison a defendant?

Mr. SIMMONS: No, Allison is not a defendant. There is
190 no issue raised that would make that testimony competent.

Mr. LOWE: I want to bring knowledge to them that they had not only constructive but actual knowledge of these leases.

The MASTER: Well, go ahead.

Exception by defendants.

(Question read.)

A. Yes, sir.

Q. Do you remember what he said about—What Allison said?

A. Well, no, not exactly.

Mr. SIMMONS: Well, then, that is sufficient.

Q. Do you know what Allison did with the lease?

A. Yes.

Q. What?

A. He delivered it to me until he was to see *he was to see* whether the lease—these oil leases were good or not; left it in my hands.

Q. And what did you do with the lease?

A. I just kept it, that is all I could do with it.

Q. Have you got it yet?

A. No, sir; I turned it over to him at the time he sold it to Little & Willett.

Q. Well, now, that is what I was getting at. Did Allison develop any of this territory?

A. No, sir.

Q. Now, what disposition did Allison make of it, if you know?

A. He sold it to Little & Willett and I went with him to Robinson—we wanted to go down there to look at the records to see whether—

Mr. SIMMONS: Now, wait, I object.

The MASTER: Well, it is not material what you wanted to go down there for. What was said, if anything?

Mr. LOWE: Well, he can tell what they did, your Honor.

The MASTER: Yes.

Mr. SIMMONS: I know, but he isn't doing that.

The MASTER: Well, you did go down to Robinson?

The WITNESS: Yes, sir. You want me to finish it?

The MASTER: Yes.

Q. Yes, go ahead now and tell it.

A. They wanted to look at the record and I went with them.

191 Q. Now, who do you mean by "they?"

A. I mean Little—or Willett and Allison. It seems as though Allison had not said anything to Willett about these Walton leases and when they looked at the records he found it.

Q. Now, let me ask are you speaking of the Susannah Smith lease or the James A. Smith lease, or both of them?

A. Both of them.

Q. Now, go ahead.

A. They was both given at the same time and I had them both in my possession; and Willett says, "There is another lease given here before that Wilcox lease on this land." Allison seemed to let on like he didn't know anything about it, found it on the record, and he said he would have to look that up and from the record we went up, back up into a law office, I think it was Arnold's on the outside of the square, and they talked there a little while and Willett said he would go and telephone and see about that, and he went out and was gone a while and come back and took the leases. That is all I know anything about that.

Q. Do you know anything about the complainants, or either of them having given notice to any of the people who claimed an interest there other than Gillespie?

A. Anyone else——

Mr. LOWE: Read the question, Mr. Reporter.

(Question read.)

A. No, sir.

Q. You don't know of any notice having been given other than what Gillespie gave?

A. Oh, yes, I know of Gillespie but no one else.

Q. Well, you don't understand the question. You may state whether or not you know of Gillespie having given notice to other people?

A. Yes, sir.

Q. Just state what that was?

A. Well, when there was a rig pulled in there on the 60 acres on the first well that was drilled on that farm the sheriff come up from Robinson and tacked a notice on the rig. He couldn't find anybody else there to serve it on—notifying the people that was drilling the well that he was the legal and proper owner of that property.

Mr. HINDMAN: Just wait, If there was any notice, he can't give the contents of that notice, if it was in writing.

192 Q. Do you know what it—Did you read it?

A. Yes, sir.

Q. Can you tell what it contained?

A. Well, I can tell you part of it.

Mr. HINDMAN: We object.

Mr. TROUP: I think he has a right to testify to that, it is a notice.

The MASTER: Well I expect that would come under the class of a monument.

Mr. SIMMONS: Well, that is not the lease question.

Mr. LOWE: It shows that the complainants were trying to give notice to everybody they could find.

The MASTER: Well but who instructed the sheriff?

Mr. LOWE: Well, Mr. Gillespie did; he signed the notice and we will show that fact if the court will just permit us.

The MASTER: Well, go ahead and show it.

Exception by defendants.

Q. Now you may state the substance of the notice, and who signed it, and what it stated.

A. Well, I can't give you that notice just word for word.

Mr. HINDMAN: We desire to make up the record—the defendants each separately object to the question and the answer elicited by it for the reason it is attempting to show the contents of a written instrument which instrument would be the best evidence.

The MASTER: Well, I understand this instrument was tacked onto a permanent structure there.

Mr. LOWE: Well, it is a rig that they had for drilling a well.

Mr. HINDMAN: Yes, but that wouldn't make the thing that was tacked on a permanent structure.

The MASTER: Well, he wouldn't have any authority to bring it in.

Mr. HINDMAN: Well, he could bring in a copy of it.

The MASTER: Well go ahead and prove it.

Exception by defendants.

Q. Now, just state it in substance.

Mr. SIMMONS: Now, we want to object.

A. Well, it started something like this—

Mr. SIMMONS: I want to object further for the reason that they are asking him who signed that.

Mr. LOWE: I am asking him whose name was signed to it, that is what I want him to do.

193 The MASTER: Well, just describe the notice you saw there.

Exception by defendant.

The WITNESS: I will try it again, if you fellows will—The notice started out, "You are hereby notified that I am the legal owner"—Well I can't just give it to you word for word how that notice read.

Q. Well, give the substance of it, that is what we are asking for.

A. "Of this property" and went on to state that they was hereby notified that he was the legal owner of the oil and gas on this farm, or something to that amount; signed, E. N. Gillespie.

Q. Do you know when that was?

A. It was put on there in June.

Q. Of what year?

A. 1906.

Q. Was anyone present with you at the time?

A. Yes, sir.

Q. Who?

A. James A. Smith.

Q. James A. Smith, the defendant in this suit?

A. Yes, sir; James A. Smith was the one that told me about the notice being tacked on the rig.

Q. And then you and him together—

A. We went down there and read it,—both of us.

Q. Did you ever talk with anybody who claimed to own the right to drill there at that time about it?

A. Talked to the man that drilled the well.

Q. And who were they?

A. W. C. Cochran.

Q. Did he have any rights in the Wilcox lease, if Wilcox had any?

A. Well, indeed, I don't know.

Mr. SIMMONS: No, no, that is all now.

The WITNESS: Well, W. C. Cochran stayed with me a while. He was boarding with us a while and told me—

Mr. SIMMONS: No, no.

Q. Did Wilcox tell you?

A. No, Wilcox didn't tell me.

Q. Did Cochran tell you in the presence of any of the defendants in this suit?

A. No, sir.

Q. Did Cochran tell you anything about it while he was working on the land?

194 A. Yes, sir.

Mr. LOWE: Now, anything that was said on the land at the time we have a right to prove.

Mr. SIMMONS: I think not; ask the question and see.

Mr. LOWE: Well, that is just exactly what I have done.

The MASTER: If anything was said in the presence of any of the defendants, Smith or Wilcox, or any of those people it might be competent, I don't understand that a man can walk on another man's land,—

Mr. LOWE: He was walking on his own land. He had a right there at that time and claimed rights there, and then what he said would bind him.

Mr. SIMMONS: Oh, not any laborer or driller there.

Mr. LOWE: Well, he got an interest from Wilcox in part of this lease, is what we will prove if we are permitted to, that is, that he said he did.

Mr. HINDMAN: Well, he is not a party to this suit.

Q. Who was in possession of the land where that rig was and operating the rig?

A. W. C. Cochran.

Q. Now, while he was claiming to own that there did he make any statements to you?

Mr. SIMMONS: Now, wait, we object, your Honor; he has not even proved that he claimed to own it. He says he doesn't know.

The MASTER: He simply showed that he was on the land there drilling. I didn't understand the witness to say that he claimed under it.

Q. I will ask you if—Did he claim to own it?

A. Own the land?

Q. No, the right to drill there, the leasehold?

A. Yes, sir.

Q. Now, I will ask you if he made any statements there when he was claiming to have ownership and if he made them what were they?

Mr. SIMMONS: Now, we object, your Honor, for the reason that this man Cochran is not a defendant, and it has not been shown that he claimed—that he was any owner in the lease; it has not been shown that he was anything more than a common driller.

Mr. LOWE: Well we are going to show that, if you will give us an opportunity.

Mr. SIMMONS: Better show it first.

195 The MASTER: Well, would it be competent if you did prove these things?

Mr. LOWE: It would give us the right, I assume, to cancel these leases.

The MASTER: Which leases?

Mr. LOWE: The Wilcox leases. They are clouds on this title beyond any question and we ask to have them removed by this bill.

The MASTER: Well, who is representing Wilcox?

Mr. LOWE: Nobody. He will make default I apprehend when court meets. He failed to make an answer, but of course, we must prove the allegations of our bill.

The MASTER: What land was he drilling?

The WITNESS: He was drilling on the land that Susannah Smith owned by—well, she has a life dower in it.

Mr. LOWE: And they are in the Walton leases?

Mr. SIMMONS: Yes, but it is neither of these pieces.

The MASTER: Well, if you will agree to connect Wilcox with this matter you can introduce the evidence.

Mr. LOWE: Well, I don't want to mislead the court. It is my understanding that Wilcox let Cochran have this lease or gave him an interest in it and I understand that was a quarter interest, but I don't know whether that is true or not, and I don't know whether I can prove it, that is my understanding.

The MASTER: Well, I understand; of course, I don't see how it would be binding on anybody unless he had some claim in it—Cochran.

Mr. LOWE: Well, let the testimony go, then.

The MASTER: Well, if you will connect it with Wilcox I will let it go in. If it is not connected I will not consider it.

Mr. LOWE: Well, I don't know whether we can prove it up or not.

The MASTER: Well go ahead and show it, and if you don't—
 Q. Now, you may state what Cochran said to you there on that lease where he claimed to own an interest in the leasehold estate.

Mr. HINDMAN: We desire to have the record show an objection on the part of the defendants.

The MASTER: Go ahead and answer.

Exception by defendants.

A. Why, he said he got that lease from Wilcox and was talking to me one evening about it, and he said he believed he was crooked and wanted me to go up with him to my mother-in-law's—

Mr. SIMMONS: Now, we object to that, your Honor, that is not proper.

The WITNESS: You asked me to know what he said. If you want to know what he said, let me tell it; if you don't I won't say anything.

The MASTER: No, it must be something that is relevant to the issues here.

Mr. LOWE: I apprehend the witness cannot distinguish whether it would be relevant or irrelevant; he has just got to tell the conversation.

The MASTER: Well I suppose you had something in mind that you wanted to prove by him.

Mr. LOWE: Well I will withdraw the question then.

Q. Did you ever hear Wilcox say anything about it?

A. No, sir.

Q. After they had drilled a dry hole there?

A. Don't know that I did.

Q. You may state, if you know whether or not the defendants, Susannah Smith and James A. Smith, or either of them, received notice from the bank that the deposits—that the rental had been paid there?

A. Yes, sir.

Q. Well, you may state now what you saw.

A. Well, I saw a card that they got from the Bank once or twice.

Q. Can you tell the substance of what that card contained?

A. No, I couldn't; it has been a good while ago.

Q. Well, can you tell anything about what it was about? What it was trying to inform them of?

Mr. HINDMAN: Oh, I object to that; the cards themselves would be the best evidence.

Mr. LOWE: But you have got them; we haven't got them.

Mr. HINDMAN: Well, now, if it is competent at all and if you need them, and if you will take the proper step you can very easily get them.

The MASTER: Well, of course, if they insist on the objection—

Mr. SIMMONS: We most certainly do.

The MASTER: You will have to show something—Whatever they said there about it would be competent.

Mr. LOWE: Well, first, I will put it in the record, (Q) Did you see the cards?

197 A. Yes, sir.

Q. Can you tell what they purported to say, or what they did say the substance of it? Now, wait a moment, can you or not?

A. Yes, sir.

Q. Now, then, we will ask you to tell us what that was.

Mr. SIMMONS: We object.

The MASTER: I understand no effort has been made to procure these by notice or subpoena.

Mr. LOWE: No, sir.

The MASTER: Well, the objection will be sustained.

Exception by complainants.

Mr. LOWE: Now, I ask you gentlemen representing these defendants Smith, have you got these cards here? (In pursuance to which request, the defendant James A. Smith produced the cards demanded.)

Mr. LOWE: Well, now, gentlemen we want you to have these cards present at any time when we want them; you may ask him.

Cross-examination by Mr. HINDMAN:

Q. Mrs. Susannah Smith is your mother-in-law?

A. Yes, sir.

Q. And she is a widow?

A. Yes, sir.

Q. And she consulted you quite frequently about her business transactions and especially the leasing of her land?

A. No, not the first leasing, no sir.

Q. Well, she did subsequently, afterward?

A. Yes, sir.

Q. Later on?

A. Yes, sir.

Q. After her experience with the first lease known as the Walton lease she consulted you after that?

A. No, sir; she leased twice before she consulted me.

Q. Did she?

A. Yes, sir.

Q. The second time she leased was to Mr. Wilcox?

A. Yes, sir.

Q. Well she consulted you about the Wilcox lease, didn't she?

A. No, not until after she had leased.

Q. Well she had a conversation with you about it?

A. Afterward.

198 Q. Yes. She said that Wilcox claimed that he had made a mistake in part of the lease, and wanted her to give a second lease and she wanted to consult you about it?

A. No, sir; he had got the second lease before she consulted me.

Q. Well—And she was asking you your advice about the propriety

of her giving the Wilcox lease, told you why she had given it, didn't she?

A. Well, I don't know that she did practically tell me why. She had already given the leases and told me what he had told her after she had given it.

Q. Yes, and she told you her reasons for giving the second lease, didn't she?

A. Yes.

Q. Yes, both of them?

A. Well, she said that he told her that the first lease was no good, and that he wanted a lease on her land and would drill her a well right away.

Mr. LOWE: Well your Honor, we object to that; that couldn't bind us.

Mr. HINDMAN: It is a part of the same conversation you went into.

The MASTER: Well, if it was a part of the conversation that he was asked about a while ago, you may go ahead.

Mr. LOWE: Well, let me inquire. (Q.) Is it?

A. Which?

Q. Is this the same conversation you told about a while ago that you were telling about now?

A. It is part of it, yes sir. You wouldn't let me tell it a while ago when I started to tell it; you stopped me, somebody did.

Mr. LOWE: Well the other side stopped you.

The WITNESS: Yes, I know they did.

Mr. LOWE: Yes, they did. Now, here is what I want to ask you,—is whether what he is inquiring about now, was that repeated at the same time and place that you told about a while ago?

A. Oh, I don't know. You fellows have mixed me up. I don't understand.

Mr. HINDMAN:

Q. Well, I will get you straightened out. I am not trying to confuse you; all I want is to get a straight story. I will not try and confuse you if you are so. I understand now that your mother-in-law, Mrs. Smith, called you by telephone?

199 A. Yes, sir.

Q. And said she wanted to talk to you in regard to the leasing of her land.

A. She didn't say what she wanted when she told me.

Q. Well, at any rate—

A. That is what she wanted when I got there.

Q. That is what she wanted to talk to you about?

A. She wanted to talk to me about the lease, yes sir.

Q. And informed you that she had given a second lease to Wilcox?

A. Yes, sir.

Q. And told you about the Walton lease that she had given?

A. Well, she told me about that long before this.

Q. Well, did she tell you her reasons for believing the Walton lease at an end?

A. Said Mr. Wilcox told her so.

Q. Did she tell you why he had told her so upon what he based his conclusion?

Mr. LOWE: Now, then, to that we certainly object.

Mr. HINDMAN: If she told him, it is part of the conversation.

The MASTER: Well, just wait a minute. (Q.) You testified in answer to Mr. Lowe about a conversation you had with your mother-in-law with reference to this matter, what Wilcox said, what your mother-in-law had said that Wilcox told her?

A. Yes, sir.

Q. Was this all in the same talk, both what Mr. Hindman is asking you about—?

A. Why, it was all about the same time, something near the same time. We talked about it several different times.

Q. Well, was that all in the same conversation at the same time she called you over there?

A. Now, if you fellows will just let me tell the whole thing I can tell you about it; if you want it just a little piece at a time, I can't tell it.

Mr. LOWE: We want the whole story.

The WITNESS: Well, somebody stops me every time I start to tell it.

Mr. HINDMAN: I am not stopping you. I want you to tell everything that was said.

The WITNESS: Well I can't tell just everything that was said,—it has been too long ago.

Mr. HINDMAN: Well, the substance of it.

200 The MASTER: At the time she called you over there by telephone.

Mr. HINDMAN: The whole conversation?

Mr. LOWE: Now, Mr. Harris, it would not be proper to relate a conversation Mrs. Smith had with Wilcox unless it is the same conversation that you told me in part about a while ago. It must be at the same time and place. Now, answer this question. Was this conversation—was what he is inquiring about now the talk of that visit when you had your talk there—

Mr. HINDMAN: Now, we object to that; I propose to ask my own questions and not have counsel in—

The MASTER: Now, here, I will explain it to you so you will understand it, I think. You had a conversation with your mother-in-law when she called you over there by telephone?

A. Yes, sir.

Q. And that is what you answered with reference to when Mr. Lowe asked you a while ago?

A. That is part of it; that is part of it.

The MASTER: Well, now, anything else that was said in that conversation with your mother-in-law you may answer in response to Mr. Hindman's question.

Mr. HINDMAN: Yes, now my question is, go ahead and tell the whole of that conversation, everything that was said.

Mr. LOWE: But don't tell anything that was said at any other time.

The WITNESS: Now, I bet you stop me before I get through, somehow.

Mr. HINDMAN:

Q. Well, go ahead, and see.

A. Well, now, if you do, it is the last time I will try to tell you anything about it. She told me that Mr. Wilcox—she had given Mr. Wilcox a lease and he came back and told her that there was a mistake in the lease and he wanted to rectify it and take another, and he would return that one, and she give it to him and she said "He has not returned it." This was a few days after that he had taken the lease, and she said that he told her that the first lease was no good, it was out, and that he would stand between her and any old lease that might arise and also he would write it in the lease. That was about the conversation. Now, do you want to know what I told her? If you want it all, I will tell you what I told her.

Q. Well, we will presently, but I want to see if that is all.
201 Did she tell you in that conversation why she had told Wilcox about the old lease, the Walton lease—why it was at an end?

A. I don't know whether she did or not at that time.

Mr. LOWE: Then we insist that it be not given.

Q. Did she say to you why Wilcox had said the lease was at an end?

A. Well, she said like this,—that he looked at the copy of the first lease, the Walton lease—

Q. Yes. Well did she tell you that she had told Mr. Wilcox—

Mr. LOWE: Now, I object, your Honor.

The MASTER: Wait a minute, until he gets through.

(Question read.)

Q. About Walton having complied with his lease, whether he had complied.

Mr. LOWE: Now, are you through?

Mr. HINDMAN: Yes.

Mr. LOWE: To that we object.

The MASTER: Well if it was at that time he may answer.

Mr. LOWE:

Q. Did she tell you at that time?

A. I don't remember whether she did or not.

Mr. LOWE: Well, we object to the question now.

Mr. HINDMAN: The question is proper.

Mr. LOWE: Well, what I want is him not to give this proof, you can call it what you like.

Q. Now, you stated in your original examination that they had

told you—your mother-in-law had told you that they had made inquiry at the bank?

A. Yes, sir.

Q. Well, now there was something else that you had forgotten that she said. Tell all about it, what she said about making inquiry at the bank and what information she had received from the bank.

A. She said that Jimmie had wrote to the bank and got a letter from the Bank that there was no rental there; also went and got the letter and showed it to me.

Q. You saw a letter?

A. Yes, sir.

Q. From what Bank?

A. Well, it was from the Martinsville Bank but it has been so long ago I can't just give you the name of it; I paid no attention much to it; only at the time.

202 Mr. LOWE: Well, now, your Honor, if they have that letter I think it ought to state, instead of what somebody——

Mr. HINDMAN: Well, we are cross-examining now as to the conversation you went into.

Mr. LOWE: You asked him as to the contents of the letter.

Mr. HINDMAN: No, I didn't ask as to the contents of any letter.

Q. Now, what else, if anything, was said about the payment of rental?

A. I don't know whether there was anything at that time or not.

Q. Who was present at the time that letter was shown to you from the bank?

A. From the bank?

Q. Yes.

A. Well, her two daughters was there and I think James A. was there.

Q. Was it your mother-in-law or your brother-in-law that brought the letter, showed you the letter.

A. It was my mother-in-law that handed me the letter.

Q. And when was this?

A. I think this was the fore part of March. I wouldn't say. I know it was the fore part but I don't know just what day.

Q. What year?

A. 1906.

Q. It was after she had given the Wilcox lease at any rate?

A. Right along about the same time; it was right in amongst all them. I don't know just when the Wilcox lease was given.

Q. Well, you said that she called you over there after the Wilcox lease was delivered and she told you about having given the Wilcox lease?

A. I don't think she called me over after the Wilcox lease and showed me this letter. I wouldn't say whether it was before or after that I saw this letter.

Q. And in this conversation she was telling you about Wilcox wanting to get a second lease on account of a mistake, and he promised to give back the first lease——

A. No. She was not telling me about him wanting to get it. He already had had it before I knew it.

203 Q. Well, that is it exactly. Then it was after she had given the Wilcox lease?

A. That is it, yes sir; that is just exactly what I said.

Q. Now, you was also interrogated about the Allison lease, a conversation you had that was in relation to that lease, and also a conversation that you had with Mr. Allison. You went with Mr. Allison to Robinson, Illinois, did you?

A. Yes, sir.

Q. For the purpose of making an examination of the record?

A. Well for that purpose partly and part of it was not for that purpose. I went with him to see whether the lease was all right or not.

Q. There was somebody else with Mr. Allison?

A. No, sir; I was with Mr. Allison and nobody but me and him went down.

Q. Didn't somebody else go with Mr. Allison to examine the record?

A. They did, to go and examine the record, yes, sir.

Q. Who was that?

A. Mr. Willett.

Q. Willett. At that time Allison was negotiating a sale of his lease on these premises to Willett?

A. Yes, sir.

Q. And you were making an investigation to ascertain the condition of the title?

A. That is it.

Q. And you at that time was holding the Allison lease?

A. Yes sir.

Q. Had held it how long?

A. Oh, some two weeks, I think.

Q. It had been delivered to you at the time of its execution?

A. Yes sir.

Q. Do you remember the date of it, about when?

A. Well, I think it was either—it was the last of August, or the first—it was in August some time, I am positive, some time the latter part of August.

Q. Wasn't it the 31st day of August?

A. Well, that would be the latter part, wouldn't it? The latter part of August, I don't know whether that was it or not.

Q. The deal was closed up in that same transaction, that same trip to Robinson, in McCarty & Arnold's office there in Robinson, wasn't it?

204 A. Yes, sir.

Q. And the assignment was made from Allison to Willett and Little?

A. No, it was made to Willett.

Q. Well, to Willett then. Upon investigation of the records, the discovery was then made that the Walton lease was on record.

A. No, that's where Willett found it out.

Q. Well, that's it; Willett found it out at that time?

A. Yes, sir.

Q. And that matter was discussed. Willett then said that he would not buy the lease of Allison until he made some investigation as to the validity of the Walton lease, didn't he?

A. No, I didn't say that at all.

Q. Well, what was it he said?

A. He said he would go over to the telephone office to telephone. He didn't say that he wouldn't buy it, or that he would buy it, or anything of the kind.

Q. Who did he say he would telephone to?

A. He was going to telephone to the bank.

Q. Did he say what bank?

A. Why, the lease told him what bank to telephone, right on the record there.

Q. Well, what was said in that conversation about the rentals not having been paid at that time?

A. Well, Allison told him, he says, "There has been no rental paid on this".

Q. Did Allison state how long there had been no rentals paid, or what steps had been taken to find out there had been no rentals paid?

A. Why, James A. Smith and his mother, Susannah Smith, had told him that there had not been.

Q. That there had been no rentals paid up to that time?

A. Yes, sir.

Q. And Willett said he would go and telephone——

Mr. LOWE: Just a minute, your Honor. I object to the answer that James A. Smith and Susannah Smith told him.

The MASTER: I understand he is giving a conversation between Allison and Willett.

Exception by complainants.

205 Q. Allison told Willett that the rentals had not been paid, as he had learned from Susannah Smith and James A. Smith; is that right?

A. He asked him how he knowed it, or something of that matter, and he said they told him so.

Q. Well now, that's it; that's my understanding. And Willett then said, "I will go to the telephone and telephone the bank and find out?"

A. No, he didn't say the bank. He said "I will go and telephone."

Q. And did he go and telephone?

A. He went somewhere, he went out.

Q. And then came back, and the deal was closed?

A. Yes, sir.

Q. That was either the 31st day of August, or the first day of September, 1906, wasn't it?

A. It was right along there sometime, I won't say just exactly the date.

Q. Now, you have testified something about a notice that the sheriff had stuck up on some rig, to the effect that "I own this gas interest", or something of that kind, the contents exactly you are unable to give; that's right, isn't it?

A. Yes, sir, I can't read it just word for word.

Q. Yes, but the purport was that "I own this gas interest on these premises"?

A. Oil and gas.

Q. Yes, oil and gas interest, on these premises. On what premises was that rig—it wasn't on either the twenty acres or the thirty acres involved in this case, was it?

A. No.

Q. No, on a different piece of land.

Mr. LOWE: Wait, Mr. Hindman.

Q. Well, it was on a different piece of land, wasn't it, not on either of these tracts of land in controversy in this case.

A. It was on the Susannah Smith sixty.

Q. Yes, but you understand that the property in controversy in this case is the twenty acres of James A. and the thirty acre tract of Susannah's. Well, this rig was not on either of those premises?

A. No, sir.

Mr. HINDMAN: That's all.

206 Redirect examination by Mr. LOWE:

Q. Mr. Hindman got you to say, I think, that at the time your mother-in-law called you down there by phone after the second Wilcox lease had been given, is the time you talked about the letter. Now, you didn't mean to say that, did you?

A. I don't know whether I talked about the letter then, or whether it was before or afterwards.

Q. Well, you don't mean to say positively it was after the Wilcox lease was given?

Mr. SIMMONS: Just wait, your Honor, that is leading.

A. No, sir, I don't know.

Mr. LOWE: I am leading because that is what he drew out.

Mr. SIMMONS: I don't care, that doesn't change the rule. We object to this question.

The MASTER: Well, let him fix the time when he talked about the letter.

Q. Well, can you fix that time?

A. I couldn't tell you the first time that we ever talked about this letter, no sir.

Q. You won't say that, whether it was before or after the Wilcox leases?

A. No sir.

Q. Do you mean to say that the Allison lease was given the latter part of August?

A. No, I don't say anything about that. I don't remember of saying anything about its being given then,—transferred then.

Q. Do you remember who said the 31st of August?

A. Well, he asked me if it was transferred at that time, or I understood him that way.

Q. Well, I didn't get that understanding that way.

A. That's the way I understood it.

Q. Well, that's what you mean to say then?

A. Yes sir, then is when the transfer—the latter part of August is when it was transferred.

Q. Well, let me ask you, did Mr. Louis E. Willett know of the Walton lease before he bought the Allison lease?

Mr. SIMMONS: Now wait, we object to that, as a rank conclusion.

The MASTER: Well, if this witness knows when he bought the lease, he may answer.

Exception by defendants.

207 WITNESS: I certainly ought to know, I was right there.

The MASTER: Well, I don't know, what you know; that is the question.

Mr. SIMMONS: If this witness knows, he knew it, it was by some act of Willett, or what he said.

Mr. LOWE: That's it.

Mr. SIMMONS: Now, I object to it.

Mr. LOWE: Well, you can inquire into that, Mr. Simmons, if you like.

Mr. SIMMONS: Well, I want to insist on my objection, that is asking for a conclusion.

Exception by defendants.

Q. I want you to state now whether you know of your own knowledge that Louis E. Willett knew of the M. A. Walton lease on the land in controversy before the purchase of the C. E. Allison lease.

Mr. HINDMAN: Now, we object, because this witness is being asked about the knowledge of some other persons, which he could not possibly know except by conversation, what was told him.

The MASTER: Well, it all simmers down to this: If he knows whether he bought it at the time of the examination of the records there or not.

Mr. LOWE: Well, I think that the question is proper, and if it is, he ought to answer it. I am asking him if he knows of his own personal knowledge.

The MASTER: Well, do you know of your own knowledge whether he bought it at the time the records were examined?

A. I do.

The MASTER: Well, if you know of your own knowledge, you may answer the question.

Exception by defendants.

Q. Now, you may answer.

A. He never knew anything about this lease until he examined

the records, and he examined the records the very day that he bought it.

Q. Well, now, did he examine the records before he bought it or after?

A. Before—before he paid for it anyhow.

Mr. LOWE: That's it exactly; that's what I was trying to get at all the time. You may be excused.

Here agreed between complainants and defendants respectively in the above entitled causes, that at the time of the bringing
208 of suit, the citizenship of complainants and defendants respectively is as alleged in the respective bills of complaint, and that the matter in controversy in the respective suits, at that time, was of a value in excess of \$2,000.00, exclusive of interest and costs.

It is admitted between all of the parties to these suits that James A. Smith was at the time of the execution of the respective leases the owner in fee simple of the real estate described in the respective leases executed by him, in controversy in these suits.

Testimony of E. N. Gillespie.

Mr. E. N. GILLESPIE, a witness called on behalf of the complainants, being first duly sworn, was examined in chief by Mr. Lowe, and testified as follows:

Q. What is your name, age, occupation, and place of residence?

A. E. N. Gillespie, age 39, residence Freeport, Pennsylvania, engage din the oil and gas business.

Q. In what way?

A. As a producer.

Q. Do you know the other complainants in this suit?

A. Yes sir.

Q. What relation do they sustain to you in a business way?

A. Partners.

Q. In the business of what?

A. Producing oil and gas.

Q. Where—in what state?

A. Illinois.

Q. Do you know R. L. Prosser?

A. Yes, sir.

Q. In whose employment was he on the 13th day of November, 1905? if you know?

A. He was in our employ.

Q. By "our," you mean whom?

A. Guffey, Gillespie & Pitcairn.

Q. The complainants in this suit?

A. Yes sir.

Q. You may state whether or not you know of his having purchased what has been referred to as the Walton leases?

A. Yes, he did.

Q. At whose direction did he purchase them?

- 209 A. At mine.
 Q. For whom?
 A. For the firm of Guffey, Gillespie & Pitcairn.
 Q. Who paid for them?
 A. I did.
 Q. How?
 A. With a check made payable to M. A. Walton.
 Q. For whom did you pay it?
 A. For Guffey, Gillespie and Pitcairn.
 Q. I hand you Exhibit 43, and ask you what that is (Handing paper to witness)?
 —. Well, that is a check payable to the order of M. A. Walton, for \$11.00, and signed with my name.
 Q. What was that given for?
 A. For the lease—two leases, one on Susannah, and the other on James A. Smith.
 Q. You may state if those leases—if there is any litigation concerning those leases.
 A. Yes, sir.
 Q. In what suit? Now, you needn't tell the names of the suit; you can just say whether or not it is in litigation in this suit. I don't know as it hurts anybody.
 A. Yes sir, it is in litigation just now.
 Q. To whom was this transferred by M. A. Walton?
 A. Mr. Prosser.
 Mr. LOWE: I now offer this exhibit 43 in evidence.
 Copy of which said exhibit is as follows:

Exhibit 43—Check, Dated Oct. 11, 1905.

COMPLAINANTS' EXHIBIT 43.

"GRANTSVILLE, W. VA., Oct. 11, 1905. No. 606.

The Calhoun County Bank

Pay to the order of M. A. Walton, Eleven..... Dollars,
 For

xx

\$11.100

E. N. GILLESPIE.

(Stamped on the face.)

Paid Nov. 22, 1905,

The Calhoun County Bank,
 Grantsville, W. Va.

210 On the back of which said check appears the following endorsements:

"M. A. Walton."
 "Pay Bank of the Ohio Valley,
 Wheeling, W. Va., or order;
 All prior endorsements guaranteed,
 The Bank of Cameron,
 Cameron, W. Va.
 W. M. Nowell, Cashier."
 "Pay to the order of
 Any Bank, Banker, Bankers or
 Trust Company
 Prior endorsements Guaranteed.
 The First National Bank,
 Harrisville, W. Va.
 A. J. Wilson, Cashier."
 "Pay any Bank, or Trust Company
 All prior Endorsements Guaranteed.
 Bank of the Ohio Valley,
 Wheeling, W. Va.
 J. H. McDonald, Cashier."

Q. You say your firm is in the business of producing oil and gas. To what extent are you engaged in that business?

A. Well, to a considerable extent.

Q. You may state what your holdings are in oil territory, oil leases.

A. We have property under lease in the neighborhood of 70,000 acres of land.

Mr. SIMMONS: How many acres?

A. 70,000.

Q. And have you any oil producing territory in this state?

A. Yes sir.

Q. About how many wells?

A. Well, we have drilled in the neighborhood of a hundred, but they are not all producing, not all producing wells.

Q. By whom were they drilled; I don't mean who did the work, but for whom were they drilled?

A. Guffey, Gillespie and Pitcairn.

Q. And when did you begin business in Illinois, Mr. Gillespie?

A. Early in the year 1905.

211 Q. And since that time is when the well has been drilled.

A. Yes, in the neighborhood of one hundred wells since that time.

Q. When, you took the leases, for what purpose did you take it, either buying or originally?

Mr. HINDMAN: We object.

Mr. LOWE: They charge in their answer that it was for speculation. We want to show that they never sold a lease in their life, never have sold a lease.

The MASTER: Well, you have hardly reached that point yet.

Mr. SIMMONS: It would be in rebuttal, if it lies any place in this case.

The MASTER: I don't think it is material now; they may abandon that theory when they get along farther. I don't hardly believe it is material now.

Exception by complainants.

Q. These leases that have been offered in evidence were assigned to E. N. Gillespie. You may explain why that was, and for whom.

A. Well, all business is transacted in my name to facilitate the transacting of the business, and to do away with the necessity of sending papers back and forth for different signatures. But it was all done for the firm of Guffey, Gillespie and Pitcairn, as partners.

Q. At the time you began operations in Illinois, you may state whether or not the territory was developed.

Mr. HINDMAN: We object. That has absolutely nothing to do with the case.

Mr. LOWE: Why it shows whether or not we were required to drill upon it.

Mr. HINDMAN: This lease must stand upon its own merits. It speaks for itself, whether they were required to drill.

The MASTER: Well, there seems to be a controversy about this surrender clause, though. I think he may show the state of the oil business at the time he started.

Exception by defendants.

(Question is read.)

A. Not to a very great extent, it was not.

Q. You may just explain how that was, Mr. Gillespie.

A. Well, when we first started drilling, there were some wells north of Casey, between Casey and Westfield.

Q. In what County?

A. In Clark County.

212 Q. What distance was that approximately from the leases —the land described in the leases in controversy?

A. Oh, it is twenty miles or more, I expect.

Q. You may go ahead now, and tell how the development proceeded on down towards these leases.

A. Well, if I remember correctly, it was some time during the summer of 1905, there was a well that showed a small amount, one well drilled south of Martinsville, probably six miles, on the Blake-man farm.

Q. And how far was that from these leases?

A. Oh, I suppose seven or eight miles.

Q. Now, you may go on and give others.

A. Well then, there were some other wells drilled, I think, that summer west of that property, a couple of miles, in Clark County, that were producing oil. I don't know what quantity.

Q. Well now, then you may go on and tell others, if any.

A. Well, still later in the summer, there was a well drilled in Crawford County, that showed some oil and gas, probably two miles or two and a half east of Annapolis.

Q. How far would that be from the land in controversy?

A. Oh, be eight miles or farther.

Q. Well now, proceed.

A. Well, there were several wells drilled in the neighborhood of this well near Annapolis, drilled that winter, of 1906—the latter part of 1905 and 1906.

Q. Now, do you know what the field was called east of Annapolis, what farm or farms?

A. It was on the Athey farm, the large well was drilled; that is, the first one that showed oil or gas.

Q. Well now what else? Proceed on towards this land in controversy.

A. Well, sometime in the spring of 1906, I think, there were some wells producing down closer toward the Crawford County line, north of these farms in controversy, probably three and a half or four miles, or more; I don't know anything about the size, but I heard that there was some oil wells.

Q. Now you may state if you can, the first well you knew of close to the Smith land that produced oil or gas.

A. A paying well?

Q. Yes sir.

A. Well, that was in the fall of 1906.

Q. And where was it?

A. I think it was on the Fitch farm.

213 Q. How far south from this land?

A. Probably half a mile.

Q. And then where was the next?

A. Well, I believe the next one was on an adjoining farm to the east, on the Payne Farm, I am under the impression. The next one was either another one on the Fitch or on the Bowman, I don't recall.

Q. Now, when was the one on the Bowman?

A. In the fall of 1906.

Q. How far was that from the land in controversy?

A. Well I guess that joined part of this land in controversy on the west.

Q. How far was the well from the Smith land?

A. Well the the well was on—probably be a quarter of a mile or more.

Q. Now, what was the first you knew about anyone else having a lease, or having jumped your lease?

A. You mean on these properties?

Q. Yes sir, on the property in controversy.

A. Well I got—someone told me that they heard there was a rig building on a lease that we had in Crawford County north of Bellaire, and asked if we had any leases in that vicinity, and I said, yes, we had, and I don't remember all the conversation, but the result of it was that I went to Robinson, and examined the records there—

Mr. SIMMONS: Now, the question was when you found it out.

Mr. LOWE: Well, he is going to fix that by the notice.

Mr. SIMMONS: That was all he was asked. We object to this answer, because it is not responsive.

Q. Well, when was that Mr. Gillespie?

A. Well, that was in June, 1906.

Q. Now, what did you do after you found that out?

A. I went to Robinson, and examined the records to see if anyone had taken another lease, and there was nothing on the records; so, to make sure, I got a horse and buggy and drove out there.

Q. How soon, or early, after you heard of the building of the rig?

A. Well, just a day or so afterwards.

Q. Go ahead.

A. Do you want me to go ahead and tell the balance.

Q. Yes, sir.

A. Well, I drove out there, and found there was a rig
214 building just north of the house. I stopped at Susannah Smith's house, and I asked—there was a lady came to the door, and I asked if that was Mrs. Susannah Smith, and she said it was. I asked her a few questions as to who was building that rig, and who had the lease on that farm, and she told me H. E. Wilcox had leased it, and the men who were doing the work she gave me the names of Brant, T. J. Lamb, T. J. Lamb & Son, and Haskell, I believe, and Michael Long, and maybe some others I can't recall.

Q. Then what did you do then?

A. Well, I returned to Robinson, and had notices prepared, giving the names of these parties, and instructed the sheriff to serve them.

Q. I hand you exhibit 44, and ask you what that is (handing paper to witness).

A. Well, this is a copy of one of the notices that I prepared.

Q. Isn't that the original notice?

A. Yes, the original notice, yes sir.

Mr. LOWE: We now offer this notice in evidence, complainants' Exhibit 44.

Mr. SIMMONS: The defendants desire to object separately to the offer of that notice in evidence.

Mr. LOWE: What is the objection?

Mr. SIMMONS: The defendants object to this notice, because it is not competent, and the facts sought to be proven are not within the issues, and the land in controversy in this suit is not in any — involved by this notice, it having already been shown that this tract was on a separate, an entirely separate piece of land from anything claimed or leased by Mr. Allison.

The MASTER: Well, do you object because the return is sworn to?

Mr. SIMMONS: Oh no, we don't object because—

The MASTER: The objection will be overruled.

Exception by defendants.

Counsel for Complainants offered Exhibit 44, in evidence, a copy of which is in the words and figures following:—

Exhibit 44—Notice.

"PITTSBURGH, PA., June 12, 1906.

"To T. J. Lamb, T. J. Lamb & Son, H. E. Wilcox, Susannah Smith, R. R. Brant, Judson E. Haskell, Michael Long, et al.:

You are hereby notified that the undersigned is the legal
 215 owner of the oil and gas privileges on and under the Susannah Smith farm situated in the Township of Licking, County of Crawford and State of Illinois, described as follows, to wit: The Southeast quarter of the Northeast quarter of Section Two in Township Eight North, of Range Fourteen West, and the North half of the Northeast quarter of the Southeast quarter of Section Two, Township Eight north, of Range Fourteen West and part of the Northwest quarter of the Northeast quarter of the Southeast quarter of Section Two, Township Eight North, of Range Fourteen West and part of the Northwest quarter of the Northeast quarter of Section Eleven, Township Eight North, or Range Fourteen West, estimated to contain ninety acres, be the same more or less, under and by virtue of a grant, lease and conveyance made by the said Susannah Smith bearing date May 22d, 1905, and you are hereby notified "That we shall hold you responsible for all damages and for all your acts or for in any way interfering with the rights and privileges given under said grant and lease.

(Signed) GUFFEY, GILLESPIE & PITCAIRN.

STATE OF ILLINOIS,
Crawford County, ss:

I, the undersigned hereby certify that I served the above and foregoing notice on the said T. J. Lamb, T. J. Lamb & Son, H. E. Wilcox and Susannah Smith, by delivering to each of them a true copy of said notice and by reading the same to each of them this 15th day of June A. D. 1906, and also posted notice on derrick on said premises.

(Signed)

C. V. COULTER,
Deputy Sheriff.

N. J. HIGHSMITH, *Sh'ff.*

Fees \$7.00.

Q. What was the financial condition of this firm at the time they took this lease, and since that time, as to whether or not they were able to develop the territory?

Mr. HINDMAN: Oh, we object.

The MASTER: He may answer.

Exception by defendants.

A. Well, we are always willing, ready and able to carry through any undertaking that we take up.

216 Q. Did you pay any of the rentals under these Smith leases, in pursuance to the terms thereof?

A. Yes sir.

Q. How and where did you pay them?

A. I paid some of them personally, and others I mailed to the exchange bank; that is, I paid personally to the bank, and at other times, I mailed them to the bank.

Q. Did you hear the testimony of Judge Gasaway and Sinclair?

A. Yes sir.

Q. As to the checks you had given?

A. Yes sir.

Q. You gave the checks as inferred there, did you; you gave the checks as testified to by them, did you?

A. Yes sir.

Q. I hand you now Exhibit 19 (handing paper to witness), and ask you what that is.

A. That is a check made payable to the State Bank of Martinsville, Illinois, for \$21.88.

Q. Signed by who?

A. Signed by E. N. Gillespie.

Q. That isn't the one I want. I want the one signed by Lancashire. I now hand you exhibit 30 (handing paper to witness).

A. Well this is a check made payable to the State Bank of Martinsville, Illinois, for -21.88, signed by W. H. Lancashire.

Q. Now, who was W. H. Lancashire?

A. Our bookkeeper and—

Q. By "our" who do you mean?

A. I mean Guffey, Gillespie and Pitcairn.

Q. Was he authorized to make payments of rentals?

A. Yes sir, if I was not there.

Q. For whom did he give that check in payment of rentals?

A. For Guffey, Gillespie and Pitcairn.

Q. For what purpose did you pay these rentals testified to by Gasaway and Sinclair?

A. In accordance with the terms of the lease given by Susannah and James A. Smith.

Q. Lease or leases?

A. Leases.

Q. Given to whom?

A. To M. A. Walton.

217 Q. Who owned these leases at the time those payments were made?

A. Beonged to the firm of Guffey, Gillespie and Pitcairn.

Q. After you had served the notices, or caused it to be served by the sheriff, what did you do afterwards, if anything?

A. Well, I communicated with Mr. Guffey, one of my partners, told him what had been done, and the result of that conversation was that I was to procure the services of an attorney in Illinois, and he would procure the services of legal counsel in Pittsburgh.

Q. Who?

A. Mr. Guffey.

Q. For the purpose of what?

A. Of bringing suits against Wilcox and others who had taken possession of this lease.

Q. Well now, what was the result of that effort of getting attorneys?

A. Well, I went to see Golden & Scholfield, and explained the situation, and they told me—Mr. Scholfield sent me to Robinson, told me that we needed an attorney in the County in which the lease was situated.

Q. By Mr. Scholfield, who do you mean?

A. Mr. Bates Scholfield, W. B. Scholfield. He took me and introduced me to Parker & Crowley; and we talked the matter over with them.

Q. Go ahead.

A. Well, they said for me to secure all the evidence that I could, and they would prepare suits to be brought at the September Term of court.

Q. Well, go ahead.

A. Well, while we were gathering up the evidence, hunting up everything we could in connection with the case, we learned through some way that Susannah Smith had given another lease on this property to some one. This was some time in August.

Q. Of what year?

A. 1906, just before the September Term of court. Well, we were trying to find out as quick as possible whom she had given the lease to; we got some information that she had given another lease to Wilcox—that a man named King had gotten another lease on it, and I don't know whether Allison's name was mentioned or not, but there were two or three. At any rate, we couldn't find anything on
218 the record to show who got these subsequent leases. So, by that time it was too late to get our suit in that September Term of Court.

Q. You may state how often the courts meet in Crawford County.

A. Twice a year.

Mr. SIMMONS: Wait. The court judicially knows that better than the witness.

The MASTER: Well, I would have to look it up in the statute; go ahead and state when it was.

A. Twice a year, in September and March, is my understanding.

Q. Well, now, than what did you do after that, when you were trying to find out who had the leases?

A. Well, I talked with our attorneys about it, and they said the only thing we could do was to try and find out if anyone moved in and started any active operations, and probably in that way we could find out who they were, and also by searching the records occasionally, and probably something would appear that would give something to go by.

Q. You may state whether or not you had the records searched, or searched them.

A. Yes, sir, both had them searched and searched them myself.

Q. Now, by searching the records, what records do you mean?

A. Why the lease records, book of leases.

Q. In what office?

A. In the Crawford County Court House.

Q. Well, whose office in there?

A. The Clerk's office.

Q. What clerk?

A. Well, the county clerk, I suppose, or Circuit clerk, I don't know what you call him. We call them recorders.

Q. Well, I will ask you if you mean the Recorder's office.

A. The Recorder's Office, is what I mean.

Q. Yes, that's all right. Now, what was the result of that search?

A. Well, we didn't find anything, and along in the early part of February, 1907, we did find something.

Q. And what was that?

A. Well, we heard that someone had drilled a well on the James A. Smith, and I sent one of our men out to see what was going on out there.

219 Q. What did you find out?

A. And he came back, and reported that there was nothing going on, on active work, that he could notice around any place but had said something about—he learned something about a gas well being drilled on the James A. Smith; but his report did not satisfy me when it came in. He didn't make it definite enough in regard to this gas well, so I asked him where he got his principal information, and he told me from M. E. Harris. Well, I said "I am going to write a letter. Mr. Harris doesn't know me, and I am going to write him a letter and ask in regard to who has this lease, and who drilled this well, if there was a well drilled, and I want you to sign it because he knows you; you were out talking to him today—yesterday." So I wrote that letter.

Q. Have you got that letter?

A. I have a copy of it in my copy book.

Q. You may turn to it.

A. Here it is (producing book).

Q. Now then, when was that copy made?

A. Right at the very time it was written.

Q. What kind of a copy is it?

A. Why, it is just a letter press—regular wet impression from the original.

Q. Taken right from the original letters?

A. Taken right off the original.

Q. Now, you may read it.

Mr. HINDMAN: We object.

Mr. LOWE: Well, we ask the court—he sent it to the other man and of course hasn't got the original, but this was taken off of that and is a duplicate.

Mr. HINDMAN: Even if he had the original, it wouldn't be competent—self-serving.

The MASTER: I think the fact that you have shown that he made inquiries and wrote letters about it is sufficient. I don't see how the letters themselves are evidence.

Mr. LOWE: Very well.

The MASTER: You may show the facts that he did write letters. Exception by complainants.

Q. Now, when was that, Mr. Gillespie?

A. I wrote this letter February 16th, 1907.

Q. Did you get any reply to that letter?

A. Yes, sir.

220 Q. From whom?

Mr. SIMMONS: Now, we object to that, your honor.

Mr. LOWE: Well, we are not offering it in evidence now, but we are showing the fact——

The MASTER: Well, he may answer.

Exception by defendants.

A. Got a reply from M. E. Harris.

Q. The party to whom you wrote it?

A. Yes, sir.

Q. What is the date of the reply?

A. I will have to look (witness examines paper), February 20th.

Q. What year?

A. 1907.

Q. What did you do as a result of this reply, Mr. Gillespie?

A. We went to the records, and made another search, and found a lease had been given by Susannah Smith and James A. Smith to one C. E. Allison.

Q. Now, let me ask you: you found a lease given by those two?

A. Found it on the records.

Q. One lease given by the two?

A. No, two leases. One by each of them.

Q. That's it; do you remember the date of the recording of those leases?

A. The date, I think was the 28th of January, 1907.

Q. Then what did you do after that?

A. Reported these facts to our attorneys, and we tried to get our evidence up then just as quick as we could—this was in February—to get it into the March Term of court, but it was impossible.

Q. Go ahead; what did you do after that?

A. Well, we then in talking the matter over with our attorneys, on account of there being so many leases given on this property, and it being hard to trace the matter down to who really did own it, we concluded to have an abstract made of the property from the time it first appeared on record.

Q. Did you have that made?

A. Yes sir.

Q. By whom?

A. By, I believe, a Mr. Henderson, of Robinson.

221 Q. What were the dates of those abstracts, as certified to by him?

A. One the 5th and the other the 6th of April 1907.

Q. Then what did you do with the abstracts?

A. They were turned over to our attorneys and suits brought.

Q. Did you get a report then by your attorneys as to the abstracts?

A. Yes sir.

Q. What is the date of those reports? (Hands papers to witness.)

A. This one is April 9th, 1907.

Q. By whom is that report made. Just give the names of the attorneys.

A. Parker & Crowley.

Q. They were the parties who were looking after this matter for you?

A. Yes, sir.

Q. And then what was the next step, Mr. Gillespie?

A. Well, the next step was to have a consultation with our attorneys to get every person into court, that we could, that showed they had an interest in these leases.

Q. Now, when was the next term of court after you got your abstracts and got this date?

A. September, 1907.

Q. Now what did you do further with your attorneys, or otherwise?

A. Well, we gathered out evidence together as quick as we possibly could, and brought suit in August.

Q. Of what year?

A. 1907.

Q. At what term of court?

A. September Term.

Q. 1907?

A. Yes sir.

Mr. SIMMONS:

Q. That was in the Crawford County Circuit Court?

A. Yes sir.

Mr. LOWE:

Q. Well, what was the result of that suit, Mr. Gillespie?

A. Well, that suit was continued until the March Term for some reason.

Q. And what was done at the March Term?

222 A. At the March Term we took a non-suit, and brought it in this court.

Q. How long after you took a non-suit before you brought the suit in this court?

A. I think the following day.

Q. Now, I will ask you why you did that.

A. Well, we had confidence in the Federal Court, and also in the advice of our counsel.

Q. Well, what was the—just tell what it was, the reason you dismissed the suit down there.

A. Well, that was one reason; another reason was that there were some decisions given in the State Courts down there that we didn't like.

Q. They were against you in other words?

A. Yes.

Q. Well, then you have been in this court ever since, trying to get here?

A. Yes sir.

Q. Were there any other notices given other than the ones you have spoken of, by the sheriff?

A. Yes, yes sir.

Q. You may state what they were.

A. Well, after we had gotten this information from Mr. Harris, and also from the records, notices were prepared and Mr. Prosser served them.

Q. For whom was Mr. Prosser acting?

A. For Guffey, Gillespie and Pitcairn.

Q. What was Mr. Prosser's duties generally, Mr. Gillespie?

A. Well, he generally did leasing.

Q. Where was he?

A. Well, he was a- various places, different states.

Q. Well, just state now about where he was.

A. Well, he would be in Indiana, Kentucky, Illinois, Missouri.

Q. You may state whether or not it was any of Mr. Prosser's duties to watch these leases, and keep you advised, and otherwise to watch and report to you?

A. Oh no, not unless he was sent out to do it especially.

Q. I hand you exhibits 7 and 8 (handing papers to witness). What are exhibits 7 and 8?

A. Well, they are notices served on Louis E. Willett, Evans and King, and James A. Smith.

223 Q. Well, what do you mean, served on them or directed to them?

A. Directed to them, yes.

Q. Now, by whom is it signed?

A. Signed by E. N. Gillespie, for Guffey, Gillespie and Pitcairn.

Q. Who signed each one of those notices?

A. The same name.

Q. Well, who did it?

A. I did it.

Q. Did you cause any other notices to be given to any person or corporation?

A. Yes sir.

Q. You may state to whom.

A. We served notice on the Ohio Oil Company.

Q. I now hand you exhibits 45 and six, and ask you what they are (handing papers to witness).

A. Well, they are notices served on the Ohio Oil Company.

Q. I will ask you whose name is signed to them.

A. E. N. Gillespie, Joseph F. Guffey, A. S. Guffey and Robert Pitcairn, Jr.

Q. Who signed those names?

A. Well, I signed mine, and I think—well, I don't know—Mr. Guffey's—I am familiar with his signature. He signed that, I know—Joseph Guffey.

Q. Well, that is a partnership, is it?

A. Yes, sir, I will swear to these two copies.

Counsel for complainants offered in evidence Exhibit 45, a copy of which is in the words and figures following, to wit:

Exhibit 45—Letter.

"MARSHALL, ILLINOIS, Sept. 21, 1907.

"To the Oil Company.

GENTLEMEN: You are hereby notified that the undersigned are the owners of all the oil (except the one-eighth royalty) under and produced from that tract of land in Crawford County, Illinois, being the West one-half of the North East one quarter of the Northeast one-quarter of Section Eleven, Town. Eight North, Range Fourteen West, containing twenty acres, more or less.

This tract of land was and is owned in fee simple by James A. Smith who being so seized leased said tract for oil and gas purposes to M. A. Walton on May 22, 1905, by lease recorded on June 224 15, 1906, in said County, in Lease Record No. 1 at page 450. Said lease by sundry mesne assignments has become vested in the undersigned.

A suit in equity entitled E. N. Gillespie et al. vs. James A. Smith, J. W. Solley, C. F. Johnson and Walter Hennig is pending in the Circuit Court of Crawford County to have a judicial determination of the title to the oil under and produced from the above described premises.

You are therefore notified, requested and required not to pay the purchase price of any oil (save the one-eighth royalty of oil) run from the premises to any other than the undersigned and are warned that if you do so we will hold you responsible therefore.

"Yours respectfully,

(Signed)

E. N. GILLESPIE.

JAS. F. GUFFEY.

A. S. GUFFEY.

ROBERT PITCAIRN, JR.

PARKER & CROWLEY,
SCHOLFIELD, GOLDEN & SCHOFIELD,
CALLAHAN, JONES & LOWE,
CHAS. GIBBS CARTER,

Solicitors.

(On the reverse side of foregoing appears:)

STATE OF ILLINOIS,
County of Clark, ss:

Before me, the subscriber, the undersigned authority, personally came Chas. Gibbs Carter, who being duly sworn according to law, did depose and say that he served the within notice upon The Ohio Oil Company he giving a true copy thereof to J. K. Kerr, their Agent in that behalf.

And further sayeth not.

(Signed)

CHAS. GIBBS CARTER.

Subscribed and sworn to before me this 21st day of September, 1907.

(Signed)

BESSIE MARTIN,
Notary Public.

Counsel for complainants here offered in evidence Exhibit 46, a copy of which is in the words and figures following, to wit:

Exhibit 46—Letter.

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"MARSHALL, ILLINOIS, Sept. 21, 1907.

to the Ohio Oil Company.

GENTLEMEN: You are hereby notified that the undersigned are the owners of all the oil (except the one-eighth royalty) under and produced from that tract of land in Crawford County, Illinois, being the northwest quarter of the north east quarter of Section Eleven (11), Town, eight (8), Range Fourteen (14), except ten acres off the West side thereof, containing thirty acres.

This tract of land was and is owned by Susannah Smith who being seized in fee simple leased said tract, among others, for oil and gas purposes to M. A. Walton on May 22, 1905, by lease recorded on June 15, 1906, in said County, in Book 1 of Leases at page 452. said lease by sundry mesne assignments has become vested in the undersigned.

A suit in equity entitled E. N. Gillespie et al. vs. Susannah Smith, W. Solley, C. F. Johnson and Walter Hennig is pending in the Circuit Court of Crawford County to have a judicial determination of the title to the oil under and produced from the above described premises.

You are therefore notified, requested and required not to pay the purchase price of any oil (save the one-eighth royalty of oil) run from the premises to any other than the undersigned and are warned that if you do so we will hold you responsible therefore.

"Yours respectfully,

(Signed)

E. N. GILLESPIE.
JAS. F. GUFFEY.
A. S. GUFFEY.
ROBERT PITCAIRN, JR.

PARKER & CROWLEY,
SCHOLFIELD, GOLDEN & SCHOFIELD,
CALLAHAN, JONES & LOWE,
CHAS. GIBBS CARTER,

Solicitors.

(On the reverse side of the foregoing appears:)

STATE OF ILLINOIS,

County of Clark, ss:

Before me, the subscribed, the undersigned authority, personally came Charles Gibbs Carter, who being duly sworn according

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226 to law, did depose and say that he served the within notice upon The Ohio Oil Company by giving a true copy thereof to J. K. Kerr, their agent in that behalf.

And further sayeth not.

[SEAL.]

(Signed)

THOS. GIBBS CARTER.

Subscribed and sworn to before me this 21st day of September, 1907.

BESSIE MARTIN,
Notary Public.

Q. I now hand you Exhibits 47 and eight, and ask you what they are (Handing papers to witness).

A. They are notices served on the Ohio Oil Company, in regard to these leases.

Q. Whose names are signed there?

A. E. N. Gillespie, Joseph F. Guffey, A. S. Guffey and Robert Pitcairn, Jr.

Q. They are complainants in this case?

A. Yes, sir.

Counsel for complainants offered in evidence Exhibit 47, a copy of which is in the words and figures following, to wit:

(Letter head of E. N. Gillespie, Robinson, Ill.)

████████████████████

Exhibit 47—Letter.

"ROBINSON, ILLINOIS, March 23rd, 1908.

To the Ohio Oil Company, Marshall, Illinois.

"GENTLEMEN: You are hereby notified that the undersigned are the owners of all the oil (except the one-eighth royalty) under and produced from that tract of land in Crawford County, Illinois, being the West one-half of the North East one-quarter of the Northeast one-quarter of Section Eleven, Town. Eight North, Range Fourteen West, containing twenty acres, more or less.

"This tract of land was and is owned in fee simple by James A. Smith who being so seized leased said tract for oil and gas purposes to M. A. Walton on May 22, 1905, by lease recorded on June 15, 1906, in said County, in Lease Record No. 1 at page 450. Said lease by sundry mesne assignments has become vested in the undersigned.

227 "The suit in equity pending in the Circuit Court of Crawford Co. and entitled E. N. Gillespie et al. vs. James A. Smith et al., referred to in our notice to you under date of Sept. 21, 1907, has been dismissed and a new suit for the same purpose instituted in the Circuit Court of the United States for the Eastern District of Illinois.

"Your are therefore notified, requested and required not to pay the purchase price of any oil (save the one-eighth royalty of oil)

run from the premises to any other than the undersigned and are warned that if you do so we will hold you responsible therefor.

"Yours respectfully,
(Signed)

E. N. GILLESPIE,
JAS. F. GUFFEY,
A. S. GUFFEY,
ROBERT PITCAIRN, JR.,
By CHAS. GIBBS CARTER, *Att'y.*

PARKER & CROWLEY,
CALLAHAN, JONES & LOWE,
SCHOLFIELD, GOLDEN & SCHOFIELD,
CHAS. GIBBS CARTER,
Solicitors.

(On the reverse side of the foregoing appears:)

I hereby certify that I served the within notice on The Ohio Oil Co. on the 24th day of March, A. D. 1908, at the hour of nine o'clock a. m. of said day, by leaving a true and correct copy of the same with J. L. Cook, Chief Clerk for said Ohio Oil Co.

(Signed)

W. B. SCHOLFIELD.

Counsel for complainants offered in evidence Exhibit 48, a copy of which is in the words and figures following to wit:—

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Exhibit 48—Letter.

"E. N. Gillespie, Robinson, Ill.

ROBINSON, ILL., March 23rd, 1908.

"To the Ohio Oil Company, Marshall, Illinois.

"GENTLEMEN: You are hereby notified that the undersigned are the owners of the oil (except the one-eighth royalty) under and produced from that tract of land in Crawford County, Illinois, being the Northwest quarter of the Northeast quarter of Section Eleven (11), Town. Eight (8), Range (14), except ten acres off the West side thereof, containing thirty acres.

"This tract of land was and is owned by Susannah Smith who being so seized in fee simple leased said tract, among others, for oil and gas purposes to M. A. Walton on May 22, 1905, by lease recorded on June 15, 1906, in said County, in Book 1 of Leases at page 452. Said lease by sundry mesne and assignments has become vested in the undersigned."

"The suit in equity pending in the Circuit Court of Crawford County and entitled E. N. Gillespie et al. vs. Susannah Smith, et al., referred to in our notice to you under date of Sept. 21, 1907, has been dismissed and a new suit for the same purpose instituted in the Circuit Court of the United States for the Eastern District of Illinois.

"You are therefore notified, requested and required not to pay the purchase price of any oil (save the one-eighth royalty) run from the premises to any other than the undersigned and are warned that if you do so we will hold you responsible therefor.

"Yours respectfully,

(On reverse side of foregoing appears:)

"MARSHALL, ILL., Sept. 24, 1908.

"I hereby certify that on the 24th day of March, A. D. 1908, at the hour of nine o'clock A. M. I served the within notice on The Ohio Oil Co. by leaving a true and correct copy of the same with J. L. Cook, Chief Clerk for said Company,
(Signed) J. W. SCHALFIELD."

Counsel for complainants offered in evidence Exhibit 49, a copy of which is in the words and figures following:—

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Exhibit 49—Notice.

In the Circuit Court of the United States for the Eastern District of Illinois.

JOSEPH A. GUFFEY, A. S. GUFFEY, E. N. GILLESPIE, ROBERT PITCAIRN, JR., Copartners Trading as Guffey, Gillespie & Pitcairn,
vs.

SUSANNAH SMITH, H. E. WILCOX, J. W. SOLLEY, C. F. JOHNSON, Walter Hennig, The Ohio Oil Company, a Corporation; Perry A. Little and Louis E. Willett.

To said defendants, and each of you and Parker & Eagleton, George W. Jones, Jay A. Hindman, and Abram Simmons, Solicitors for said Defendants:

You will please produce and have before the Honorable Walter T. Gunn, Master in Chancery, of said Court on the taking of the testimony in the above entitled cause in the United States Court Room of the United States Court at Danville, Illinois, on the 24th day of June, A. D. 1909, at 9 o'clock A. M. to be used as evidence in said cause the following described papers, to wit:

1st. A quit claim deed from Sarah J. Payne. et al., given to Susannah Smith, bearing date the 2d day of April A. D. 1881, conveying to her the land in controversy in this suit and recorded in Book 49 on page 76 of the deed records in the County of Crawford and State of Illinois.

2d. A certain warranty deed, bearing date the 20th day of February, 1895, given by James B. Doolittle and Mary, his wife to Sanford C. Bowman, conveying to said Sanford C. Bowman, among other lands, ten acres off west side of the northwest quarter of the northeast quarter of Section II, Township 8 North, Range 14 West in the County of Crawford and State of Illinois and found recorded

in Deed Record 59 on page 319 of the Deed Records of said County of Crawford.

3d. A certain lease given by Susannah Smith to said H. E. Wilcox, on or about the 23rd day of March, 1906 (together with any assignment thereof, of any) in and by which said lease the said Susannah Smith attempted to lease to said Wilcox the land in controversy in this suit, which said lease is recorded in Miscellaneous Record 5, on page 183 in the office of the Recorder of Deeds in said County of Crawford.

4th. Also a like lease (and the assignments thereof if any) given by the said Susannah Smith to the said H. E. Wilcox, on or about the 23d day of March, 1906, and recorded in Miscellaneous Record 5, on page 186 in the office of the Recorder of Deeds of said County of Crawford, in and by which said lands the said Susannah Smith attempted to lease the land in controversy in this suit.

5th. The original lease given by the said Susannah Smith to the said C. E. Allison on or about the 9th day of August, A. D. 1906, as found recorded in Miscellaneous Record 6, on page 471 of the records in the office of the Recorder of Deeds of said County of Crawford in and by which said lease the said Susannah Smith attempted to lease to the said C. E. Allison, the lands in controversy in this suit.

6th. The assignment of the above lease by C. E. Allison to Lewis E. Willett, dated September 1, 1906, and found recorded in Miscellaneous Record 6, on page 473, in the office of the Recorder of Deeds of said County of Crawford.

7th. An assignment of said lease by said Lewis E. Willett to J. W. Solley and C. F. Johnson, bearing the date of 25th day of March, 1907, and found recorded in Miscellaneous Record 8, on page 437 in the office of the Recorder of Deeds, of said County of Crawford.

Of all the above matters you will please take notice and be governed accordingly.

Dated at Robinson, Illinois, this 21 day of June, A. D. 1909.

(Signed)

CALLAHAN, JONES & LOWE,
Solicitors for Complainant.

STATE OF ILLINOIS,

County of Crawford:

We hereby acknowledge the service of the above and foregoing notice on us by receiving a true copy thereof, this 21st day of June, A. D. 1909.

(Signed)

PARKERS & EZELTON,
Solicitors for Defendants.

Counsel for complainants offered in evidence Exhibit 50, a copy of which is in the words and figures following, to wit:—

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Exhibit 50—Notice.

In the Circuit Court of the United States for the Eastern District of Illinois.

No. —. In Chancery.

JOSEPH A. GUFFEY, A. S. GUFFEY, E. N. GILLESPIE, ROBERT PITCAIRN, JR., Copartners Trading as Guffey, Gillespie & Pitcairn,

vs.

JAMES SMITH, H. E. WILCOX, J. W. SOLLEY, C. F. JOHNSON, Walter Hennig, The Ohio Oil Company, a Corporation; Perry A. Little and Louis E. Willett.

To said defendants, and each of you and Parker & Eagleton, George W. Jones, Jay A. Hindman, and Abram Simmons, Solicitors for said Defendants:

You will please produce and have before the Honorable Walter T. Gunn, Master in Chancery, of said Court, on the taking of the testimony in the above entitled cause in the United States Court room of the United States Court at Danville, Illinois, on the 24th day of June, A. D. 1909, at 2 o'clock p. m., to be used as evidence in said cause the following described papers, to wit:—

1st. A lease given by James A. Smith to H. E. Wilcox, bearing date on or about the 23rd day of March, A. D. 1906, and found recorded in lease record No. 1, on page 417, in the office of the Recorder of Deeds of said County in and by which said lease the said James A. Smith attempted to lease to the said H. E. Wilcox, the lands in controversy in this suit, for oil and gas; together with the assignments thereof, if any. .

2d. A lease given by the said James A. Smith to the said H. E. Wilcox, bearing date on or about the 23rd day of March, A. D. 1906, and found recorded in Miscellaneous Record 5, at page 182 in the records in the office of the Recorder of Deeds of said County of Crawford (together with any assignment thereof), in and by which said lease the said James A. Smith attempted to lease to the said H. E. Wilcox, the lands in controversy in this suit for oil and gas purposes.

3rd. A lease given by said James A. Smith to the Said C. E. Allison, bearing date on or about the 9th day of August, 1906, and found recorded in Miscellaneous Record 6, on page 474 in the office of the Recorder of deeds of said County of Crawford, in and by which said lease, the said James A. Smith attempted to lease to the said C. E. Allison, the lands in controversy in this suit.

4th. The assignment of the above lease by the said C. E. Allison to Lewis E. Willett, bearing date on or about the 1st day of September, 1906, as found recorded in Miscellaneous Record 6, on page 475 in the office of the Recorder of Deeds of said County of Crawford.

Of all the above matters you will please take notice and be governed accordingly.

Dated at Robinson, Illinois, this 21st day of June, A. D. 1909.

(Signed)

CALLAHAN, JONES & LOWE,
Solicitors for Complainant.

STATE OF ILLINOIS,

County of Crawford, ss:

We hereby acknowledge the service of the above and foregoing notice on us by receiving a true copy thereof, this 21st day of June, A. D. 1909.

(Signed),

PARKER & EAGLETON,
Solicitors for Defendants.

Exhibit 51—Copy of Lease of March 23, 1906.

Counsel for complainant offered in evidence Exhibit 51, a copy of which is in the words and figures following:—

In Consideration of the sum of One Dollar receipt of which is hereby acknowledged, James A. Smith of the first party hereby grant- and guarantee- unto H. E. Wilcox second party all the oil and gas in and under the following described premises, together with the right to enter thereon at all times for the purpose of drilling and operating for oil and gas and to erect and maintain all buildings and structures and lay all pipes necessary for the production and transportation of oil or gas.

The first party shall have one-eighth ($\frac{1}{8}$) part of oil produced and saved from said premises, to be delivered in the pipe line which second party may connect all wells, all that certain lot of land situated in the Township of Licking, County of Crawford in the State of

Illinois, described as follows, to wit:—

233 On the north by lands of Millard Payne; on the east by lands of E. I. Bline; on the south by lands of D. I. Bline; on the west by lands of Susannah Smith, being the west half of the N. E. $\frac{1}{4}$ of N. E. $\frac{1}{4}$ of Sec. 11.

This lease is given to take the place of an old lease that has been given heretofore that is no longer in force containing twenty acres, more or less.

To Have And To Hold the above described premises on the following conditions for and during the term of five years from the date hereof and as long after said term of years as oil or gas can be found on said real estate in paying quantities or the rental is paid thereon as hereafter herein provided.

If gas only is found in sufficient quantities to transport second party agrees to pay first party at the rate of \$100 Dollars annually for the product of each and every well when sold off the premises and the first party to have gas free of cost for heating and lighting purposes in dwelling house.

Second party shall bury all oil and gas lines when same interfere with cultivation and pay all damages done to growing crops by reason of operating under this grant.

In case no well is commenced within ninety days from this date then this grant shall become null and void unless second party shall thereafter pay at the rate of five dollars per acre for each year such completion is delayed each month in advance. A deposit to the credit of the first party in Eagle Bank of Casey, Ill., will be good and sufficient payment for any money falling due on this grant. First party has right to locate roads to and from places of operations and all gates to be kept closed by second party after passing by them or their employes.

Second party agrees to pay one hundred dollars to first party for the first location when the same is made and drill one well to each ten acres until the lease is drilled out and to pay One Hundred Dollars for each of the following locations as they are made, providing oil is found in paying quantities in the first and each succeeding well. Second party agrees to stand any expense or damage that may arise from any old lease.

The second party shall have the right to use sufficient gas, oil and water to run all machinery for operating said wells, also the right to remove all its property at any time and may at any time on payment of ——— Dollars to the part- — of the first part surrender this lease for cancellation after which all payments and liabilities thereafter to accrue under and by virtue of its terms shall cease and determine.

It is understood between the parties to this agreement that all conditions between the parties hereunto shall extend to their heirs, executors, successors and assigns.

In Witness Whereof the parties hereunto set their hands and seals this 23rd day of March, A. D. 1906.

JAMES A. SMITH.
J. M. MILDREW.

STATE OF ILLINOIS,
County of ———, ss:

Before me ———, a Notary Public in and for said County aforesaid personally appeared and ——— and acknowledged the execution of the foregoing lease.

Witness my hand and notarial seal this — day of ——— 190—.

Notary Public.

STATE OF ILLINOIS,
County of Crawford, ss:

I, Ira I. Wilkin, Clerk of the Circuit Court and Ex-officio Recorder within and for said County in the State aforesaid, do hereby certify that the above and foregoing is a true, perfect and complete copy of a lease given by James A. Smith to H. E. Wilcox, and recorded in Lease Record No. 1 on page 416 of the Records in the office of the Recorder of Deeds of said County of Crawford, as appears from the records of my office.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of said Court this 22d day of June, A. D. 1909.

[Seal of Crawford County, Illinois.]

(Signed)

IRA I. WILKIN,

Clerk Circuit Court and ex-Officio Recorder of Deeds.

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Exhibit 52—Copy of Lease of Mar. 23, 1906.

Counsel for complainants, offered in evidence Exhibit 52, a copy of which is in the words and figures following, to wit:

In Consideration of the Sum of One Dollar, the receipt of which is hereby acknowledged James A. Smith of the first party hereby grant- and guarantee- unto H. E. Wilcox, second party all the oil and gas in and under the following described premises, together with the right to enter thereon at all times for the purpose of drilling and operating for oil and gas and to erect, maintain all buildings and structures and lay all pipes necessary for the production and transportation of oil or gas. The first party shall have one-eighth ($\frac{1}{8}$) part of oil produced and saved from said premises to be delivered in the pipe line which second party may connect all wells, namely: all that certain lot of land situated in the Township of Licking, County of Crawford in the State of Illinois, described as follows, to-wit: On the north by land of; On the east by lands of; On the south by lands of; On the west by lands of: West $\frac{1}{2}$ of the N. E. of the N. E. of Sec. 11, Town. 8, Range 14 West containing 20 acres (twenty) more or less:

To Have And To Hold the above described premises on the following conditions for and during the term of five years from the date hereof and as long after said term of years as oil or gas can be found on said real estate in paying quantities or the rental is paid thereon as hereafter herein provided:

If gas is found in sufficient quantities to transport second party agrees to pay first party at the rate of 100 Dollars annually for the product of each and every well when sold off premises and the first party to have gas free of cost for heating and lighting purpose- in dwelling house.

Second party shall bury all oil and gas lines when same interfere with cultivation and pay all damage done to growing crops by reason of operating upon this grant.

In case no well is commenced within ninety days from this date then this grant shall become null and void unless second party shall thereafter pay at the rate of five dollars per acre for each years such completion is delayed. A deposit to the credit of the first party in Eagle Bank, Casey, Ill. will be good and sufficient payment for any money falling due on this grant. First party has right to locate roads to and from place of operation and all gates to be kept closed by second party after passing by them or their employees.

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Second party agree- to pay first party the sum of One Hundred Dollars for the first location when the same is made and to drill one well to each ten acres until the lease is drilled out

and to pay one hundred dollars for each of the following locations as they are made, provided oil is found in paying quantities in the first and each preceding well and to pay the same rental as above mentioned until oil is transported after produced in paying quantities.

The second party shall have the right to use sufficient gas, oil and water to run all machinery for operating said wells also the right to remove all its property at any time and may at any time on payment of One Dollar to the party of the first part, surrender this lease for cancellation after which all payments and liabilities thereafter to accrue under and by virtue of its terms shall cease and determine:

It is understood between the parties to this agreement that all conditions between the parties hereunto shall extend to their heirs, executors, successors and assigns.

In Witness Whereof the parties hereunto set their hands and seals this 23rd day of March, A. D. 1906.

JAMES A. SMITH.
THOMAS WELSH.

(Margin) 2d party agrees to stand any expense or damage that may arise from any old lease.

STATE OF ILLINOIS,
County of Clark, ss:

Before me Dan B. Kelly, a Notary Public in and for said County aforesaid personally appeared James A. Smith, and acknowledged the execution of the foregoing lease.

Witness My hand and notarial seal this 23rd day of March, 1906.

[SEAL.]

DAN B. KELLY,
Notary Public, Casey, Illinois.

STATE OF ILLINOIS,
County of Crawford, ss:

I, Ira I. Wilkin, Clerk of the Circuit Court and ex-officio Recorder within and for said County in the State aforesaid do hereby certify that the above and foregoing is a true, perfect and complete copy of a lease given by James A. Smith to H. E. Wilcox, and 237 recorded in Miscellaneous Record 5, on page 182 of the Records in the office of the Recorder of Deeds of said County of Crawford, as appears from the records of my office.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of said Court this 22d day of June, A. D. 1909.

[SEAL.]

(Signed) IRA I. WILKIN,
*Clerk Circuit Court and ex-Officio Recorder
of Deeds, Crawford County, Ill.*

Counsel for complainants offered in evidence Exhibit 53, a copy of which is in the words and figures as follows, to wit:

Exhibit 53—Copy of Lease of Mar. 23, 1906.

In Consideration of the sum of One Dollar, the receipt of which is hereby acknowledged, Susannah Smith or the first party hereby grant- and guarantee- unto H. E. Wilcox, second party, all the oil and gas in and under the following described premises, together with the right to enter thereon at all times for the purpose of drilling and operating for oil and gas and to erect and maintain all buildings and structures and lay all pipes necessary for the production and transportation of oil or gas.

The first party shall have ($\frac{1}{8}$) part of oil produced and saved from said premises to be delivered in the pipe lines — which second party may connect all wells namely: all that certain lot of land situated in the Township of Licking, County of Crawford, in the State of Illinois, described as follows, to wit:

On the north by lands of Loomis; on the east by lands of Thomas Geff; and E. Payne; on the south by lands of M. Harris; on the west by lands of Sam Fitch and M. Payne, The S. E. of N. E. Sec. 2, T. 8 R. 14 containing 40 acres, and the W. $\frac{1}{2}$ of the N. E. of the S. E. of Sec. 2, T. 8, R. 14 containing 20 acres and part of the N. W. of the N. E. of Sec. 11, T. 8 R. 14 containing 30 acres, Licking Twp. Crawford Co., Illinois, containing sixty 60 acres more or less.

To Have And To Hold the above described premises on the following condition for and during the term of five years from the date hereof, and as long after said term of years as oil or gas can be found on said real estate in paying quantities or this rental is paid thereon or thereafter herein provided.

238 If gas is found in sufficient quantities to transport second party agrees to pay first party at the rate of 100 Dollars annually for the product of each and every well when sold off premises and the first party to have gas free of cost for heating and lighting purposes in dwelling house.

Second party shall bury all oil and gas lines when same interferes with cultivation and pay all damages done to growing crops by reason of operating under this grant.

In case no well is commenced within ninety days from this date then this grant shall become null and void unless second party shall thereafter pay at the rate of Five Dollars per acre for each year such completion is delayed each month in advance. A Deposit to the credit of the first party in the Eagle Bank, Casey, Ill., will be good and sufficient payment for any money falling due on this grant. First party has right to locate roads to and from place of operation and all gates to be kept closed by second party after passing by them, or their employees. Second party agrees to pay first party the sum of One Hundred Dollars for the first location when the same is made and to drill one well to each ten acres until the lease is drilled out and pay One Hundred Dollars for each of the following locations as they are made providing oil is found in paying quantities in the first and each preceding well and to pay the

same rental as above mentioned until oil is transported after produced in paying quantities.

The second party shall have the right to use sufficient gas, oil and water to run all machinery for operating said wells; also, the right to remove all its property at any time and may at any time on payment of One Dollar to the party of the first part surrender this lease for cancellation after which all payments and liabilities thereafter to accrue under and by virtue of its terms shall cease and determine.

It is understood between the parties to this agreement that all conditions between the parties hereunto shall extend to their heirs, executors, successors and assigns.

In Witness Whereof the parties hereunto set their hands and seals this 23rd day of March, A. D. 1906.

SUSANNAH SMITH.

THOMAS WELSH.

(On margin appears:)

2d party agrees to stand any expense or damage that may arise from any old lease.

239 STATE OF ILLINOIS,
County of Clark, ss:

Before me Dan B. Kelly, a Notary Public, in and for said County aforesaid personally appeared Susannah Smith and acknowledged the execution of the foregoing lease.

Witness My Hand And Notarial seal this 23d day of March, 1906.

[SEAL.]

DAN B. KELLY,

Notary Public, Casey, Illinois.

STATE OF ILLINOIS,
County of Crawford, ss:

I, Ira I. Wilkin, Clerk of the Circuit Court and Ex-officio Recorder within and for said County in the State aforesaid, do hereby certify that the above and foregoing is a true, perfect and complete copy of an oil and gas lease given by Susannah Smith to H. E. Wilcox and recorded in Miscellaneous Record 5, on page 183 of the Records in the office of the Recorder of Deeds of said County of Crawford as appears from the records of my office.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of said Court this 22d day of June, A. D. 1909.

[SEAL.]

(Signed)

IRA I. WILKIN,

*Clerk Circuit Court and
ex-Officio Recorder of Deeds.*

Counsel for complainants, offered in evidence Exhibit 54, a copy of which is in the words and figures following:—

Exhibit 54—Copy of Lease of Mar. 23, 1906.

In Consideration of the sum of One Dollar, the receipt of which is hereby acknowledged Susannah Smith of the first party hereby grant- and guarantee- unto H. E. Wilcox second party all the oil and gas in and under the following described premises together with the right to enter thereon at all times for the purpose of drilling and operating for oil and gas and erect and maintain all buildings and structures and lay all pipes necessary for the production and transportation of oil or gas.

The first party shall have $\frac{1}{8}$ part of oil produced and saved from said premises to be delivered in the pipe line — which
240 second party may connect all wells, namely: All that certain lot of land situated in the Township, of Licking, County of Crawford, in the State of Illinois, described as follows, to wit: On the North by lands of John Payne; on the east by lands of James A. Smith; on the south by lands of Czara Smith; on the West by lands of S. C. Bowman in Sec. 11, Licking Twp. Crawford Co., Ill., containing thirty acres, more or less.

To Have And To Hold the above described premises on the following conditions for and during the term of five years from the date hereof and as long after said term of five years as oil or gas can be found on said real estate in paying quantities or the rental is paid thereon as hereafter herein provided.

If gas only is found in sufficient quantities to transport second party agrees to pay first party at the rate of One Hundred Dollars annually for the product of each and every well when sold off premises and the first party to have gas free of cost, for heating and lighting purposes in dwelling house.

Second party shall bury all oil and gas lines when same interferes with cultivation and pay all damages done to growing crops by reason of operating under this grant.

In case no well is commenced within ninety days from this date then this grant shall become null and void unless second party shall thereafter pay at the rate of five dollars per acre for each year such completion is delayed each month in advance.

A deposit to the credit of the first party in Eagle Bank, Casey, Ill., will be good and sufficient payment for any money falling due on this grant. First party has right to locate roads to and from place of operations and all gates to be kept closed by second party after passing by them or their employes.

Second party agrees to pay first party the sum of One Hundred Dollars for the first location when the same is made and to drill one well to each ten acres until the lease is drilled out and to pay One Hundred Dollars for each of the following locations as they are made providing oil is found in paying quantities in the first and each preceding well and to pay the first party the same rental as above mentioned until oil is transported after produced in paying quantities.

The second party shall have the right to use sufficient gas, oil and

water to run all machinery for operating said wells; also the right to remove all its property at any time and may at any time
 241 on payment of One Hundred Dollars to the party of the first part surrender this lease for cancellation after which all payments and liabilities thereafter to accrue under and by virtue of its terms shall cease and determine.

It is understood between the parties to this agreement that all conditions between the parties hereunto shall extend to their heirs, executors, successors and assigns.

In Witness Whereof the parties hereunto set their hands and seals this 23rd day of March, A. D. 1906.

SUSANNAH SMITH.

(Witness)

THOMAS WELSH.

(On the Margin appears the following):

Second party agrees to stand any expense or damage that may arise from any old lease.

STATE OF ILLINOIS,
County of Clark, ss:

Before me Dan B. Kelley, A Notary Public, in and for said County aforesaid personally appeared Susannah Smith and acknowledged the execution of the foregoing lease.

Witness my hand and notarial seal this 23rd day of March, 1906.

[SEAL.]

SAM B. KELLY,
Notary Public, Casey, Ill.

STATE OF ILLINOIS,
County of Crawford, ss:

I, Ira I. Wilkin, Clerk of the Circuit Court and Ex-officio Recorder within and for said County in the State aforesaid, do hereby certify that the above and foregoing is a true, perfect and complete copy of an oil and gas lease given by Susannah Smith to H. E. Wilcox and recorded in Miscellaneous Record 5, on page 186 of the Records in the office of the Recorder of Deeds of said County of Crawford as appears from the records of my office.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of said Court this 22d day of June, A. D. 1909.

[Seal of Crawford County, Illinois.]

(Signed)

IRA I. WILKIN,
*Clerk Circuit Court and
 ex-Officio Recorder of Deeds.*

242 Counsel for complainants thereupon offered in evidence, Exhibit 55, a copy of which is in the words and figures following, to wit:—

Exhibit 55—Copy of Lease of Aug. 9, 1906.

Oil and Gas Lease.

In Consideration of the sum of One Dollar, the receipt of which is acknowledged by the first party Susannah Smith, a widow, first party hereby grants and conveys unto C. E. Allison, second party, all the oil and gas in and under the premises hereinafter described, together with said premises for the purpose and with the exclusive right to enter thereon at all times, by himself, agents and employes, to drill and operate wells for oil, gas and water, and to erect, maintain, occupy, repair and remove all buildings, poles and rods, structures, pipe lines, machinery and appliances that second party may deem necessary, convenient or expedient to the production of oil and — found in paying quantities the first party shall have the full one-sixth part of all oil produced and saved on the premises to be delivered free of cost in the pipe lines to which the wells may be connected.

Said real estate and premises are located in Crawford County, Ills., and described as follows, to-wit: Part of the N. W. $\frac{1}{4}$ of N. E. $\frac{1}{4}$ Sec. 21, Town. 8—R. 14, containing 30 (thirty) acres, more or less, hereby releasing and waiving all rights under any by virtue of the Homestead Exemption laws of this state.

To have and to hold said premises for said purposes for the term of five (5) years from this date, and so long thereafter as gas or oil produced thereon. In case no well is completed in six months from date this lease shall be null and void without further agreement between said parties.

It is agreed that, while the product of each well in which gas only is found shall be marketed from said premises, the second party will pay to the first party therefor at the rate of One Hundred Dollars per annum and give to the first party free gas for domestic purposes at the dwelling house during the same time.

Whenever first party shall request it, second party shall bury all oil and gas lines which are laid over tillable ground. Second party also agrees to pay all damages done to crops by reason of laying and moving pipe lines. No well to be nearer than 250 feet of residence buildings on premises without written consent of first party.

Second party agrees to commence a well on said premises within one month from date or pay to first party at the rate of Twelve dollars for each month thereafter the completion of said well is delayed. All moneys falling due under the terms of this lease to be paid direct to first party.

In further consideration of the payment of One Dollar first party grants unto second party the exclusive option and right to release and terminate this grant, or any undrilled portion thereof, at any time; thereafter all liabilities of said second party as to the portion leased shall cease and determine:

Second party agrees to pay on completion of first producing well ten barrels or better, fifteen (\$15) Dollars per acre for said land.

If well is not drilled or rental paid as agreed, this lease is null and void.

Second party shall have the right to use sufficient gas, oil and water to drill all wells and for all purposes necessary or convenient in operating the same.

The terms and conditions of this grant shall extend to the heirs, successors and assigns of the parties hereto.

In Witness Whereof, the parties have hereto set their hands and seals, this 9th day of August, 1906.

(Signed)

SUSANNAH SMITH. [SEAL.]
C. E. ALLISON. [SEAL.]

Witness:

M. E. HARRIS.

(On reverse side of the above, appears the following:)

STATE OF ILLINOIS,
County of Crawford, ss:

I, W. D. Holly, a Notary Public, in and for the said County, in the State aforesaid, do hereby certify that Susannah Smith, Widow, and C. E. Allison, married, aforesaid, personally known to me to be the same person whose name is subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that she signed, sealed and delivered the said instrument, waiving right of homestead exemption laws, as per free and voluntary act, for the uses and purposes therein set forth.

Given under my hand and official seal this 31st day of August, A. D. 1906.

[Seal of Crawford County, Illinois.]

(Signed)

W. D. HOLLY,
Notary Public.

244 For and in consideration of the sum of One Dollar and other good and sufficient consideration, the receipt of which is hereby acknowledged, I, C. E. Allison hereby sell, assign, transfer and set over unto Lewis E. Willett of Buffalo, New York his heirs and assigns all my right, title and interest in and to the within instrument according to the terms and limitations thereof.

Dated this 1st day of September, A. D. 1906.

(Signed)

C. E. ALLISON. [SEAL.]

STATE OF ILLINOIS,
Crawford County, ss:

I, William W. Arnold, a notary Public in and for said County, do hereby certify that C. E. Allison, personally known to me to be the same person whose name is subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that he signed, sealed and delivered the said instrument as his free and voluntary act for the uses and purposes therein set forth.

Given under my hand and Notarial seal this 1st day of September,
A. D. 1906.

[Seal of Crawford County, Illinois.]

(Signed)

WILLIAM W. ARNOLD.

*Oil and Gas Lease, from Susannah Smith to C. E. Allison, upon
Thirth Acres in Licking Township, in Crawford County, State
of Illinois.*

STATE OF ILLINOIS,

County of Crawford, ss:

I, Henry O. W. Wilkin, Clerk of the Circuit Court, and ex-officio
Recorder, within and for the County and State aforesaid, do hereby
certify that the within and foregoing instrument of writing was filed
for record on the 28th day of Jan. A. D., 1907, at 2:20 o'clock, p. m.,
and duly recorded in Volume 6 of Miscellaneous Records, on
245 page 470. In Testimony Whereof, I have hereunto set my
hand the day and date aforesaid.

(Signed)

HENRY O. W. WILKIN, *Clerk,*

By IRA I. WILKIN,

Deputy Clerk.

\$1.25 paid.

Counsel for complainants offered in evidence Exhibit 56, a copy
of which is in the words and figures as follows:—

Exhibit 56—Copy of Lease of Aug. 31, 1906.

Oil and Gas Lease.

In Consideration of the sum of One Dollar, the receipt of which
is acknowledged by the first party James A. Smith, single man, first
party hereby grants and conveys unto C. E. Allison, second party,
all the oil and gas in and under the premises hereinafter described,
together with said premises for the purpose and with the exclusive
right to enter thereon at all times, by himself, agents and employes,
to drill and operate wells for oil, gas and water, and to erect, main-
tain, occupy, repair and remove all buildings, poles and rods, struc-
tures, pipe lines, machinery and appliances that second party may
deem necessary, convenient or expedient to the production of oil
and gas thereon and the transportation of oil and gas on, upon and
over said premises and the highways along the same. If oil is found
in paying quantities the first party shall have the full one-sixth part
of all oil produced and saved on the premises to be delivered free of
cost in the pipe lines to which the wells may be connected.

Said real estate and premises are located in Crawford County,
Illinois, and described as follows, to wit: W. $\frac{1}{2}$ N. E. of N. E. Sec.
11 Town 8 Range 14, containing 20 acres, more or less, hereby re-
leasing and waiving all rights under and by virtue of the Homestead
Exemption laws of this state.

To have and to hold said premises for said purposes for the term of five (5) years from this date, and so long thereafter as gas or oil is produced thereon. In case no well is completed in 90 days from date this lease shall be null and void without further agreement between said parties.

It is agreed that, while the product of each well in which gas only is found shall be marketed from said premises, the second party will pay to the first party therefor at the rate of One Hundred
246 Dollars per annum and give the first party free gas for domestic purposes at the dwelling house during the same time.

Whenever first party shall request it, second party shall bury all oil and gas lines which are laid over tillable ground. Second party also agrees to pay all damages done to crops by reason of laying and removing pipe lines. No well to be nearer than 200 feet of residence buildings on premises without written consent of first party.

Second party agrees to commence a well on said premises within one month from date or pay to first party at the rate of ten dollars for each month thereafter the completion of said well is delayed. All moneys falling due under the terms of this grant to be paid direct to first party.

In further consideration of the payment of One Dollar, first party grants unto second party the exclusive option and right to release and terminate this grant, or any undrilled portion thereof, at any time; thereafter all liabilities of said second party as to the portion released shall cease and determine:

Second party agrees to pay on completion of first producing well of ten barrels or better, fifteen dollars per acre for said land. If well is not drilled a- rental paid as agreed. This lease is null and void.

Second party shall have the right to use, sufficient gas, oil and water to drill all wells and for all purposes necessary or convenient in operating the same.

The terms and conditions of this grant shall extend to the heirs, successors and assigns of the parties hereto.

In Witness Whereof, the parties have hereunto set their hands and seals, this 9th day of Aug. 1906.

(Signed)

JAMES A. SMITH. [SEAL.]

(Signed)

C. E. ALLISON. [SEAL.]

Witness:

W. E. HARRIS.

(On reverse side hereof appears.)

STATE OF ILLINOIS,
Crawford County, ss:

I, W. D. Holly, a Notary Public, in and for the said County, in the State aforesaid do hereby certify that James Smith, single, C. E.
247 Allison, married, as aforesaid, personally known to me to be the same person whose name is subscribed to the foregoing instrument, appeared before me this day in person and ac-

knowledgeed that he signed, sealed and delivered the said instrument, waiving right of homestead exemption laws, as his free and voluntary act, for the uses and purposes therein set forth.

Given under my hand and official seal this 31st day of August, A. D. 1906.

[Seal of Crawford County Illinois.]

(Signed)

W. D. HOLLY,
Notary Public.

For and in consideration of the sum of One Dollar and other good and sufficient consideration, the receipt of which is hereby acknowledged, I, C. E. Allison hereby sells, assigns, transfers and sets over unto Lewis E. Willett of Buffalo, New York, his heirs and assigns all my right, title and interest in and to the within instrument according to the terms and limitations thereof.

Dated this 1st day of September, A. D. 1906.

(Signed)

C. E. ALLISON. [SEAL.]

STATE OF ILLINOIS,

Crawford County, ss:

I, William W. Arnold, a Notary Public in and for said County do hereby certify that C. E. Allison, personally known to me to be the same person whose name is subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that he signed, sealed and delivered the said instrument as his free and voluntary act for the uses and purposes therein set forth.

[Seal of Crawford County, State of Illinois.]

(Signed)

WILLIAM W. ARNOLD,
Notary Public.

7366. Oil and Gas Lease from James A. Smith, to C. E. Allison, upon twenty acres in Licking Township in Crawford County, State of Illinois, First well due — Rental \$— payable — at — Bank.

248 STATE OF ILLINOIS

County of Crawford, ss:

I, Henry O. W. Wilkin, Clerk of the Circuit Court, and ex-officio Recorder, within and for the County and State aforesaid, do hereby certify that the within and foregoing instrument of writing was filed, for record on the 28th day of Jan. A. D. 1907, at 2:30 o'clock, P. M., and duly recorded in Volume 6 of Miscellaneous Records, on page 474.

In Testimony Whereof, I have hereunto set my hand the day and date aforesaid.

(Signed)

HENRY O. W. WILKIN, *Clerk,*
By IRA I. WILKIN, *Deputy Clerk.*

\$1.25 paid.

Counsel for complainants here offered Exhibit 57, a copy of which is in the words and figures following:

Exhibit 57—Agreement Dated Mar. 25, 1907.

This agreement made this 25th day of March, 1907, by and between Lewis E. Willet, of Buffalo, New York, party of the first part and J. W. Solley, and C. F. Johnson, party- of the second part, Witnesseth:

The party of the first part, for and in consideration of the sum of one dollar, and other valuable considerations, to him in hand paid by the said party- of the second part, the receipt whereof is hereby confessed and acknowledged, has sold, assigned and transferred, and does hereby sell assign and transfer to the said party- of the second part, all interest right and title to the following described Oil and Gas leases:

One lease bearing date August 9, 1906, given my James A. Smith to C. E. Allison, and covering lands situated in Crawford County, Illinois, described as follows: W. $\frac{1}{2}$ N. E. $\frac{1}{4}$ of N. E. $\frac{1}{4}$ Sec. 11 Town 8, Range 14.

One lease bearing date August 1, 1906, given by Elsona Smith to C. E. Allison, and covering lands situated in Crawford County, Illinois, described as follows: N. $\frac{1}{2}$ S. W. $\frac{1}{4}$ N. E. $\frac{1}{4}$ Sec. 11, Town 8, Range 14.

And one lease given by Sarah Jane Payne and John Payne, husband and wife, to C. E. Allison, bearing date August 20, 1906, and covering lands situated in Crawford County, Illinois, described as follows—South half of southwest quarter of Northeast quarter, Section 11, Town 8, Range 14, West, each lease containing 20 acres of land, more or less.

249 One lease given by Susannah Smith to C. E. Allison bearing date August 9, 1906, and covering lands situated in Crawford County, Illinois described as follows:—Part of the Northwest Quarter of the Northeast Quarter, Section 11, Town 8, Range 14 West, containing 30 acres more or less.

All of said leases having been heretofore duly assigned to said Lewis E. Willet, who hereby guarantees to protect and defend title under same to said J. W. Solley & C. F. Johnson.

It Is Understood And Agreed that all machinery, tools, tankage, pipes, apparatus and all other appurtenances belonging to or in anywise appertaining to said leases or any of them, also all oil or gas heretofore or hereafter produced on said lease- or any of them, to which the said party of the first part has any title or interest is hereby assigned and transferred to the party of the second part.

In Witness Whereof the party of the first part has hereunto set his hand and seal the day and year above mentioned.

(Signed)

LEWIS E. WILLETT. [SEAL.]

STATE OF ILLINOIS,

County of Clark, ss:

On this the 25th day of March, 1907, before me, the subscriber, personally appeared, Lewis E. Willet, to me personally known to

be the same person described in and who executed the foregoing instrument, and he duly acknowledged to me that he executed the same.

[Seal of Crawford County, Illinois.]

(Signed)

DOIT YOUNG,
Notary Public.

(On reverse side of foregoing appears:)

Assignment of L. E. Willett to Solley and Johnson. 8193.

STATE OF ILLINOIS,
Crawford County, ss:

This instrument was filed for record in the Recorder's office of Crawford County aforesaid on the 1st day of April, A. D. 1907, at 7 o'clock A. M., and recorded in Book 8 of Mis. on page 436.

\$1.00 paid.

HENRY O. W. WILKIN, *Recorder.*

250

Testimony of E. N. Gillespie.

Q. You may state, Mr. Gillespie, whether or not you waited to have anyone develop these leases before you would take any steps to prevent them from doing that.

A. No sir.

Mr. SIMMONS: Oh wait. We object, your honor; he can state what he did, I think would be competent, toward developing, but we object to this because it is a conclusion, pure and simple, and would lie in rebuttal, if at all.

The MASTER: Well, the lease provided that they should dig a well in nine months or pay rental.

Mr. LOWE: Yes sir, and they have intimated all the way through the testimony, casting suspicions at least, that he was sitting idly by and letting them develop the territory, and we will show that he did nothing of the kind, and had no intentions of it. Is the question competent, your honor?

The MASTER: Well, I think you may show why he delayed, if you want to.

Mr. SIMMONS: They have showed what he did.

The MASTER: I think the other would be more competent in rebuttal, if we reach that stage.

Exception by complainants.

Q. Did you state, Mr. Gillespie, what was on the place at the time you gave these notices—what developments?

A. Well, which notice?

Q. Any of them.

Mr. TROUP: The last ones, when you found out he was in there.

A. Oh, the last ones? Well, one thing I knew of being on there was a gas well, on James A. Smith.

Q. You have already stated, I believe, that you were in the oil business, and had large areas. How much land did you have?

A. 70,000 Acres.

Q. Now, you may state, if you will, what expenditures you have made in developments since you have been in this territory, by the year.

Mr. HINDMAN: Oh, we object; that doesn't have a thing to do with this case.

The MASTER: Yes, the objection will be sustained.

Exception by defendants.

Q. Are you familiar with the form of an oil and gas lease?

A. Yes, sir.

Q. In what states?

A. Pennsylvania, West Virginia and Illinois.

251 Q. You may state whether or not in your judgment it is essential to have a surrender clause in a lease, an oil and gas lease.

Mr. HINDMAN: We object.

The MASTER: That is the same proposition we had put up before, wasn't it?

Mr. LOWE: Well, we want to make the record, you know.

The MASTER: Well, you have got it three or four times; the objection will be sustained.

Exception by complainants.

Q. How are the existence of oil pools ascertained in undeveloped territory?

Mr. HINDMAN: We object to this question, for the reason it is not within the issues joined in this case, and would throw no light upon any matter in controversy.

The MASTER: He may answer.

Exception by defendants.

A. Only by drilling wells.

Q. What indication will one well give in undeveloped territory as to the extent of the pool?

A. It won't show what size pool it is at all.

Q. How can you ascertain the limits of the pool?

A. By drilling other wells.

Q. I will ask you if the surface indications will tell you what is beneath the soil?

A. Not at all.

Q. You may state whether or not it is quite expensive to drill oil wells?

Mr. HINDMAN: Oh, we object.

The MASTER: He may testify to what it costs to drill oil wells.

Exception by defendants.

Q. Go ahead.

A. Well, the cost is quite large.

The MASTER: That might be different to you and to me.

A. Well, it is very expensive.

Q. In the drilling or developing of territory, is the landlord or owner of the land liable for any of the expense?

Mr. SIMMONS: Now, we object, your honor, because it is wholly fixed by contract.

A. None whatever.

The MASTER: Yes, that depends upon the contract.

Exception by complainants.

252 Q. What season, if there is any distinction made, is developing principally done?

A. Mostly during the summer months and early fall.

Q. When is it more expensive to drill—in what seasons of the year?

A. During the winter.

Q. Why?

A. On account of the bad roads, is the principal reason.

Q. In regard to whether or not the loads are heavy, are they in hauling material for oil wells?

A. Oh, very heavy.

Mr. HINDMAN: We object to making proofs of things that are so obvious that a child——

The MASTER: Well, he doesn't have to indulge in the presumption, that I know of. He may answer.

Exception by defendants.

Q. You may answer.

A. Well, the heavy loads certainly cut into the roads when very soft, and muddy.

Q. What is the effect then of hauling material over the roads in a rainy season or winter season?

A. It cuts them up very materially.

Q. What is the practice of oil producers—by that, I mean responsible producers, when they go to develop wild cat territory, as to obtaining area in acreage?

A. Well, they try to obtain as many leases as they can in the neighborhood they want to drill.

Q. Why?

A. Well, one of the reasons is that when they get ready to drill, and do drill, that if they get — causes them to drill another well, some favorable indication—maybe a small amount of gas, or a favorable looking sand—they will want to move to another location, probably, and try it again, and they must have sufficient area so that they can feel their way from one well to the other.

Q. Are those developments usually made in a short time?

A. No, that requires a great deal of time.

Q. Then what is the custom as to the time in which leases are taken, short or long?

Mr. SIMMONS: Now, we object; wholly a matter of contract.

253 The MASTER: Yes, that is a matter of contract. The objection is sustained.

Exception by complainants.

Q. Is it necessary in taking these various leases to have an extended time?

Mr. SIMMONS: We object to that.

Mr. LOWE: I am speaking of "wild-cat" territory.

The MASTER: Well, you may show what is customary. Exception by defendants.

A. It is customary to get all the time we can.

Q. Well, do they generally get it; that's what I want to know.

A. Yes.

Q. Now, why is it customary to do that; what is the object of it?

Mr. HINDMAN: Because it is the custom, I suppose.

Mr. LOWE: Well now, wait.

The MASTER: Go ahead and answer the question.

A. Well, the object in having time enough, is so you can develop your lease, and see if you have anything or not. You must have time to drill, so that if you get a little showing, of oil or sand, and you want to move to another location, say west, and you get a little better showing there, and you still want to go west farther yet, and you get a better well there, you have to keep on going, and you have to have time to do these things, and if your leases are such short terms, that they will not permit you to make further explorations, there is no way of undertaking it.

Q. Now, in case you make those explorations and find that it is dry territory, long before the term of the lease expires, what do you do?

A. If we are satisfied that there is no oil or gas in paying quantities under that territory, we surrender it back to the farmer or the land owner.

Q. By what authority do you surrender it?

Mr. SIMMONS: Now, we object to that. It is a matter of contract.

Mr. LOWE: Well, it is the custom in those cases.

Mr. SIMMONS: Now, your honor, we object, because there can't be a custom; it is a matter of contract.

The MASTER: Well, he is asking by what method they surrender. If there is any method that he knows of, he may answer.

Exception by defendants.

254 A. Why, by having a surrender clause in their leases.

Q. Then, from what you have experienced in the oil producing business, and in developing this undeveloped territory, in taking those leases, you may state whether or not it is customary to have a surrender clause in a lease.

Mr. SIMMONS: That is objected to.

The MASTER: Yes, the objection will be sustained.

Exception by complainants.

Q. You may state, Mr. Gillespie, whether or not it is to the interest of the country, and of the owners of the land, and the developers of oil territory to have in these form of leases a surrender clause.

Mr. SIMMONS: We object for each of the defendants.

The MASTER: The objection will be sustained.

Exception by complainants.

Q. You may state whether or not it would be practicable for responsible oil producers to take a lease for undeveloped territory without a surrender clause being inserted in the lease.

Mr. SIMMONS: We object.

The MASTER: The objection is sustained.

Exception by complainants.

Q. Mr. Gillespie, you are the complainant in this case. Is there anything more that you want to state that I have neglected asking you?

A. Not that I know of.

Mr. LOWE: You may enquire.

Cross-examination by Mr. HINDMAN:

Q. Now, Mr. Gillespie, you acquired these leases from Walton when?

A. Well, I purchased them in October, 1905.

Q. 1905?

A. Yes, sir.

Q. And you have testified in your original examination that you have been ready, anxious, willing and able at all times to develop this territory—is that right?

A. Well, if I had possession of it, yes sir I would have.

Q. Who kept you off?

A. Why, the very reason that the Smith's themselves by giving so many different leases.

Q. Why, they hadn't given any leases for a long time after you had that lease, had they?

255 A. Well, you mean from the time I acquired the lease from Mr. Walton until I heard of them drilling a well; is that what you want—

Q. Nobody kept you off, was there?

A. No, sir.

Q. Then, if you were so anxious and so able, why didn't you go on and put down a well?

A. Because in my judgment I didn't think it was a proper time.

Q. Oh, that was it. It was because you was waiting to see whether or not the developments in the neighborhood would warrant it—that was it, wasn't it?

A. No, sir, not exactly.

Q. Then what was the reason?

A. Why, just because I was not ready to drill it.

Q. Why not? You testified that you was ready, willing and anxious at all times.

A. Well I hope that I have some judgment as to when I ought to drill in leases I am interested in.

Q. What is it that controls your reasons in that particular?

A. Well, many reasons, sir.

Q. Tell us one.

A. Well, one of them would be, if it was the winter season, m
roads, might not want to make any.

Q. Well, it hasn't been winter ever since the fall of 1905.

A. Part of it,

Q. Fall and spring and summer, some three or four dif
recurrences of those seasons.

A. From when?

Q. So it hasn't been winter time that has kept you from m
any developments on there, wholly.

A. Just as much as anything else.

Q. Why didn't you drill in the summer, or in the spring
the fall?

A. I didn't have it in the spring, wasn't in possession of it

Q. Didn't you have it in the summer of 1906?

A. No sir.

Q. Didn't you?

A. No sir.

Q. In the fall of 1906?

A. No sir.

Q. When did you get it?

A. In the fall of 1905.

256 Q. Yes.

A. But it didn't fall into my hands until the year 1906
early part.

Q. At what time now?

A. Well, the early part of the year, I think Mr. Prosser's as
ment was in December, 1905.

Q. Why, when you got it from Prosser—Prosser never own
did he?

A. No, but it was delivered to him to give to me.

Q. Yes, so that all the time that Prosser owned it, you own
all the time it was in Prosser's name, I mean.

A. Yes sir.

Q. You owned it and controlled it.

A. Yes sir.

Q. And could have put a well down any day that you want
couldn't you?

A. If I had felt like it, I could, yet sir.

Q. Yes, but you didn't feel like it?

A. Yes sir.

Q. That's your reason for not doing it?

A. No, not exactly.

Q. Then give us the reason.

— My reason is my judgment told me it was not the proper
to drill there.

Q. That's the only reason you have to give.

A. Other reasons were that it was the winter season, and there
no use incurring expense when I could drill it in the summer
as well.

Q. Well, now you had it the summer of 1906, didn't you?

A. No sir.

Q. What prevented you from drilling in 1906?

A. It was in possession of Wilcox.

Q. Well, but you had a lease on it?

A. Yes, but he had possession.

Q. Why didn't you take possession?

A. I wasn't ready to take possession.

Q. Oh, Wilcox went on there in 1906, and put down a well on there didn't he?

A. That is the understanding I have.

Q. Well, you saw it there, didn't you?

A. I saw the derrick, yes sir.

Q. Yes, couldn't you have taken possession just as easily as Wilcox?

257 A. Before he had possession, I could have before he got a lease.

Q. Why didn't you?

A. Because it was not the proper time to do it, in my judgment.

Q. When was the first well completed in the premises?

A. Well, I expect in June, or in the early part of July, 1906.

Q. 1906?

A. Yes sir.

Q. Was that a producing well?

A. No sir.

Q. You knew that that was not a producing well?

A. Yes sir.

Q. Had you the rentals paid then?

A. When that well was drilled?

Q. Yes.

A. Yes sir.

Q. When did you make the first payment?

A. Made the first payment in April, 1906.

Q. When was it due?

A. It was due in February, 1906.

Q. Why didn't you do it then?

A. Because I had taken some other leases in the same neighborhood that read "after twelve months", rentals were to start, and I took them to be twelve months before the rentals would start, and when I got ready to pay these rentals that were coming due in May, which would make the twelve months, I discovered that these rentals were due nine months instead of twelve. Then I immediately put the money in the bank for a year in advance.

Q. For a year in advance?

A. Yes sir.

Q. You intended then not to drill within a year?

A. No sir, I won't answer it that way, sir. I might drill it at any time when I made up my mind to do it.

Q. Well, you was only required to pay until you drilled; isn't that true?

A. Yes.

Q. Quarterly in advance?

A. Yes sir.

Q. And instead of paying quarterly you paid a year?

A. Yes sir.

258 Q. Not intending then to make any development within a year.

A. Yes, I might have made up my mind to drill that night.

Q. Yes, but when you made the payment, your intention then was not to develop.

A. No, it was not, sir.

Q. Why didn't you pay it for a quarter then, instead of for a year?

A. Because I had made that mistake, and probably I thought I might make another one, and it was not a great amount of money, and I thought I would just pay it for a year. We hadn't any office then, and it was rather hard to keep tract of things when we were taking up so many leases.

Q. Now, you discovered in June, 1906 that Wilcox was operating on the premises?

A. Well, Wilcox and other parties, just from information received.

Q. And then you commenced trying to bring a suit?

A. Yes sir, we started to get ready to bring a suit.

Q. And when did you succeed in getting that suit started?

A. The date of it finally?

Q. Yes.

A. Well, August, 1907, I believe.

Q. August, 1907, just a year wasn't it?

A. Yes, just a year.

Q. And a little more.

A. Yes, and a little more.

Q. A year and three months from the time you commenced trying to bring suit, getting ready, until you succeeded in getting it commenced?

A. Oh, it wasn't a year and three months.

Q. Now, in the meantime Wilcox had surrendered his lease, hadn't he?

A. Not to my knowledge he hadn't.

Q. The well proved dry?

A. The well proved dry, but that don't say that he would surrender his lease. I never could find on the records that he had surrendered it.

Q. When was that well brought in?

A. Well, I expect the latter part of June, or first of July, 1906, I don't know the date.

Q. Where were you staying, making your headquarters then?

A. Well, I expect Robinson, Illinois, about that time.

259 Q. Did Wilcox move his property off the lease after he had drilled in the dry hole?

A. I couldn't answer, I don't know.

Q. You made a location across on the Bowman lease at the same time, didn't you?

A. Yes sir.

Q. Now, the Bowman lease joined this Smith property on the west. When was it you went over there on the Bowman property?

A. I think it was early in the fall of 1906.

Q. In the fall of 1906?

A. Was there any operations then on the Smith property?

A. No sir.

Q. Wasn't there? You have testified about the paying of that rental in the bank at Martinsville. Were you present in the bank at that time?

A. I made the first payment there personally.

Q. In the bank?

A. Yes sir.

Q. Where was this man Prosser at that time?

A. Oh, I couldn't answer that; I don't know exactly.

Q. Why, didn't he make that payment?

A. No, I made—

Q. Didn't you send a check to make that payment?

A. Not the rental in the bank, no.

Q. Didn't it pass through his hands?

A. No sir.

Q. In March?

A. Why, I paid that in April.

Q. Yes, but I am asking you about Prosser, your man that you had down there.

A. Prosser didn't pay that rental at all; I paid it myself.

Q. The check did not pass through his hands at all?

A. No sir.

Q. And no check passed through his hand in the month of March for the purpose of paying rentals on this farm?

Mr. LOWE: To that we object, your honor; it is not being confined to this matter in controversy.

The MASTER: Oh, this is cross examination.

Exception by complainants.

A. You mean on this particular land at that time, in March, 1906?

Q. Yes sir.

A. No sir, he never paid any rental on it.

Q. Then before the 15th day of March, 1906, no payment of rental on this property had been made; is that right?

A. No, sir, there had not.

Q. And the first payment that you claim was made on the 7th day of April?

A. I made it the 4th day of April, but the bank says the 7th.

Q. You have testified something about the cost of drilling an oil well. Is there anything uniform about that?

A. Yes sir.

Q. There is?

A. Yes sir.

Q. What does it cost to drill a well in Westfield, Illinois?

A. The uniformity is that it always costs a lot of money in proportion to the depth you drill it.

Q. Yes. How much does it cost in Westfield?

A. Well, I don't know exactly; according to how deep you go with it.

Q. That is always true, isn't it?

A. Yes sir.

Q. That is about the same as asking the question "Now how long is a stick," isn't it?

A. Well, you may think so.

Q. Yes. How much does it cost to drill a well in Wetzell County, West Virginia?

A. Very heavy, I think, in that neighborhood.

Q. How much?

A. I don't know exactly, sir, I never drilled one there.

Q. Be any comparison between the two?

A. That depends upon the depth you would go.

Q. What would it cost to drill a well out there in the Casey field?

A. To the producing sand?

Q. Yes.

A. Well, it was not comparatively as expensive as it was in other parts of the field.

Q. Only about four or five hundred feet?

A. Yes.

Q. And in Wetzell, West Virginia, how much would it cost compared to the Casey field?

A. Where?

Mr. TROUP: Now, if the court please, we object to that. I don't see how that is competent.

261 The MASTER: What is the necessity of going all over the country on that proposition?

Mr. HINDMAN: I don't think there is any necessity. I simply want to emphasize the absurdity of the evidence they have already introduced.

The MASTER: Well I think you may ask him how much a foot it costs.

Q. You have been asked about the cost of drilling, and the cost of getting material on to different sites; you have been asked about the effect on roads, highways, by hauling loads upon it; you have testified that a heavy load would cut down into soft roads more than a light load. That's all true, is it?

A. Yes, sir, that's true.

Q. How did you find that out?

A. I have seen it occasionally.

Q. You testified to that as an expert, did you?

A. I wouldn't call it expert testimony on that, no sir.

Q. How many years' experience did it take you to find that out?

A. Well, I will answer that by saying that I had more experience in one winter in Illinois than I ever had in my life.

Q. Then you learned that in one winter?

A. Yes sir.

Q. Now, you were asked also about the propriety of making development in undeveloped territory without acquiring a considerable acreage. You testified that the reason was that it required some time to make the development, didn't you?

A. Yes.

Q. That is, to complete the development; but it wouldn't require a great deal of time to commence development, would it?

A. Well, that depends on how soon you want to commence it.

Q. Yes, yes, and the beginning—the time when you commence depends very largely upon whether or not you can get the test made at the expense of other people; isn't that true?

A. No, no always, no.

Q. Not always?

A. No sir.

Q. If there is a prospect in undeveloped territory now, of other people putting down a well, it is the practice of oil men to await the result of such development, isn't it, in that vicinity?

A. I don't know as it is the practice; it is done.

Q. Yes, that is the custom, isn't it?

A. No, I wouldn't say it is the custom; it is done.

Q. Well, that was what you did in this particular case, wasn't it?

A. No sir, I didn't.

Q. You knew that Hennig and his associates were constructing a well on this land, didn't you?

A. I didn't know Hennig had anything to do with it until he set it up in answer to the bill.

Q. You know that a well was being constructed on this land, didn't you?

A. I did know that Wilcox and his parties were drilling a well.

Q. You say you didn't?

A. I did, know that, yes sir.

Q. When did you find that out?

A. When I drove out to Susannah Smith's house, and found the big building.

Q. You knew also that Willett and Johnson and Hennig were constructing a well on the premises, didn't you?

A. No sir, I didn't know it at that time.

Q. Do you know W. C. Culp?

A. Yes sir.

Q. Do you remember of seeing him on a Vandalia Railroad train?

Mr. LOWE: Well now, fix the time and place.

Mr. HINDMAN: I don't have to.

A. I have met Mr. Culp many a time.

Q. You did ride with him on a Vandalia train, didn't you?

A. I don't know whether I have or not; I have met him in different places.

Q. You did have a conversation with him in relation to this Smith lease, didn't you?

A. I don't know that I did, sir; I wouldn't say yes or no.

Q. You did tell him that you was going to wait until these people completed their wells to see whether it was any good or not, so if it came in good you would take them from them and if it came in dry you didn't want the leases, didn't you?

A. What are you speaking about now—this well?

263 Q. I am speaking about now, just what I asked you.

A. Well, you didn't say which one; there are quite a number of wells there.

Q. The well being drilled on this property.

Mr. LOWE: By whom?

Mr. HINDMAN: By Little and Willett.

A. No, sir, I never said anything of the kind.

Q. Did you say that concerning the wells on this land that was being constructed by anybody?

A. Not that I recollect, haven't any recollection of it at all.

Q. Didn't you await the result of drilling on this property before making any objection, with the intention of laying claim to the leases in the event that the development proved profitable, but that if the development then being conducted should demonstrate that it was unproductive territory, you would then surrender the leases?

A. No sir, on the contrary I served notice on the parties when I found who was building the rig on the premises, and even after I heard of them completing a dry hole, I paid rental on that property.

Q. Did you serve any notice on Mr. Little, or Willett, or Hennig, or Solley, or Johnson?

A. I had notices served on Little and Willett, and on Susannah Smith, James A. Smith, King and Wilcox.

Q. What King?

A. I don't know—Evans & King; that's all I know. Wilcox, Lamb, Lamb & Son, T. J. Lamb, Haskell, everyone that I can find that was trying to take a lease up there.

Q. Why, you knew that Solley and Johnson were drilling there, didn't you?

A. No sir, not until after I brought the suit; until we got the record and got our suit established. They didn't try to drill until April, 1907; they have been drilling since that, I understand.

Q. Do you know how many wells have been drilled on there?

A. Not exactly, no sir.

Q. Do you know when the first well was drilled?

A. Well, it was—they were building the rig along about the 12th or 13th of June, 1906.

Q. Now, you knew on the first day of April that Solley and Johnson owned, or claimed to own, this lease, and were operating on the premises, didn't you?

264 A. No, we didn't know it until we got our abstract.

Q. Why didn't you know that the assignment to them was placed on record in April?

A. We got that from our abstract, which was given to us the 5th and 6th of April.

Q. Yes, the 5th and 6th of April. You didn't serve any notice on them.

A. We did by bringing suit.

Q. Yes, when did you bring the suit?

A. In August, 1907.

Q. Yes, and they had it in April, and you knew in April that they were operating on there, didn't you?

A. No sir, I did not.

Q. Why, you knew it when you got your abstract, didn't you?

A. It doesn't say that they were operating.

Q. Oh, you knew that they owned the lease, and you knew that somebody was operating?

A. Well, I didn't know whether they were or they were not.

Q. Do you mean to say that wells were being put down, and being operated, without your knowing of it?

A. Why, quite a number of them; I don't even know now how many are on there.

Q. You don't know now that operations are being conducted on the premises?

A. I know they are developing the wells, but I say I don't know how many are drilled on the premises now. They may be drilling now, as far as I know.

Q. Now, you commenced this suit in Crawford County, Illinois?

A. Yes sir.

Q. At what term of court?

A. Well, we brought suit in August, 1907 for the September term.

Q. It was not disposed of at the September term.

A. No it was continued until March.

Q. At whose instance?

A. Well, I don't recall.

Q. Didn't you have it continued yourself?

A. I don't recall what happened; the records will speak for themselves in regard to that. I don't know.

Q. I will ask you if it is not true that you had it continued and that it was not until the court was forcing you into trial that you dismissed the case there, for the purpose of avoiding

A. No, I don't know that.

Q. Why did you dismiss the case then?

A. I told you I don't remember. There were various reasons at the time, but I don't recall now what they were.

Q. You don't know why you dismissed your case in Crawford County?

A. Oh, you mean to bring it up here? Oh, I thought you meant having it continued to the March Term.

Q. No.

A. Oh, we dismissed it to bring it up here, because we had confidence in this court, and confidence in the advice of our counsel.

Q. Was it because of the abundance of confidence you had in this

court, or the decision that had just been rendered by the Supreme Court of this State?

A. Well, there was a little of both, I guess.

Q. In the Watford Oil and Gas Company?

A. I don't remember what the decisions were, but they thought we had better go to the Federal Court.

Q. The reason why you thought that was because the Supreme Court had just considered a lease identical with this one, holding it unenforceable?

A. I don't know about that.

Mr. HINDMAN: Oh, I guess that's all.

Redirect examination by Mr. LOWE:

Q. Is there anything you want to state, Mr. Gillespie? I would like to ask you where was the pipe line in regard to these leases, in June, 1906?

A. Well, I don't believe there was one south of Casey at that time; I don't believe so.

Q. How far is that from the leases?

A. Well, I guess Casey is twelve or fifteen miles.

Q. If you had developed a well there or produced a well, a producing well, could you have gotten rid of the oil?

A. Not very well, no sir.

Q. How could you have gotten rid of it, if at all?

A. Well, you couldn't have gotten rid of it without building a pipe line.

266 Q. Well, was there a pipe line there?

A. No sir.

Q. I will ask you at the time you made this payment in April that you said you thought was not due until May, if the second quarter, the second payment was not nearly due when you made the first payment on the Smith leases?

Mr. SIMMONS: Well, the leases will speak for themselves.

Q. That on the 22nd day of May, the second quarterly payment would have been due—isn't that true?

A. Oh yes, the payment would be due; that was one reason, and I didn't want to overlook it again; that was one reason.

Q. On the 22nd day of May you would have had to make the second payment anyhow; the second quarter. At the time that you were getting ready for the suits in these cases, did you have any other suits you had to get ready with any gentlemen down in that part of the country?

A. Yes, sir, at the same time we were getting ready in another suit. One of the defendants in this case was interested in it.

Q. How far was that land from the land in controversy?

A. Well, they were adjoining farms.

Q. I will ask you if they were not getting new parties interested in these leases, in the premises down there quite rapidly when you were trying to get this data?

Mr. SIMMONS: Now, your honor, that has all been gone over.

The MASTER: The evidence shows they got interested in it.

Exception by complainants.

Mr. LOWE: That's all.

Recross-examination by Mr. HINDMAN:

Q. At the time you got this lease there was no pipe line down there?

A. Not that I know of.

Q. Did you ever know of a pipe line being laid into a community until there were some wells and some production there to lay to?

A. No sir.

Q. Did you expect a pipe line to be built there without production?

A. No, I didn't suppose they would.

267 Q. Then you was waiting for a pipe line to be laid down into undeveloped territory, were you?

A. They wouldn't come here for one well anyway, if it was a producer.

Q. Then you was waiting for somebody else to make developments in that neighborhood to bring a pipe line—was that it?

A. Oh, no, I wasn't waiting—

Q. Well, were you expecting to bring a pipe line by any development that you made?

A. Why, I helped do it, sir.

Q. Then you were not waiting on a pipe line, were you?

A. A pipe line will not come in for one oil well, or for two either.

Q. No, and the point I want to make is that the reason for this delay was not because there was no pipe line—the reason there was no development there. You knew there would be no pipe line until there was development didn't you?

A. Yes, I knew that.

Q. Yes, so you didn't purpose to wait until somebody else made developments, and brought a pipe line into that community, did you?

A. I think we have done our share to develop this field.

Mr. HINDMAN: Yes; that's all.

Re-redirect examination by Mr. LOWE:

Q. Wouldn't there necessarily have had to be developments between Casey and these wells before a pipe line would come in?

A. Why, yes, it wouldn't come for one or two wells; I told him that.

Mr. LOWE: That's all.

268 GUFFEY VS. SMITH (Two Causes)—Continued.

And now, Monday, July 19, 1909, the hearing of testimony in these matters continued before Hon. Walter T. Gunn, Master, at the offices of Reed, Smith, Shaw & Beal, Carnegie Building, Pittsburgh, Pa.

Present:

Honorable Walter T. Gunn, the Master;
Hon. Asbury Lowe, James H. Beal, Robert J. Dodds, Esq., and
Arthur E. Young, Esq., for the plaintiffs, and
J. T. Hindman, Esq., and Abram Simmons, Esq., for the defend-
ants.

Testimony of Hon. Wm. Flinn.

Hon. WILLIAM FLINN, a witness called on behalf of the complain-
ants, sworn, testified as follows:

Direct examination by Mr. BEAL:

Q. Where do you reside?

A. Pittsburgh, Pennsylvania.

Q. Are you connected with the oil and gas business?

A. I am.

Q. How long have you been familiar with that business?

A. Twenty years.

Q. And with the operations in what fields?

A. West Virginia, parts of Pennsylvania and parts of Illinois.

Q. How long have you been connected with the oil and gas busi-
ness in Illinois?

A. About three years.

Q. Do you know the general character of the leases that are ordi-
narily taken for oil and gas purposes in Illinois?

A. No; I know the leases our people have taken there. I don't
know the leases ordinarily taken.

Q. Are you familiar with what is ordinarily called the surrender
clause in oil and gas leases?

A. Yes, sir.

Q. And what is the fact as to whether that clause is usually in-
serted in the leases taken for oil and gas purposes?

A. It is.

Q. And has been for many years?

269 A. Yes, sir.

Q. What are the reasons for the introduction into an oil
and gas lease of that provision, Senator?

Counsel for the defense renew their objection to all this class of
testimony, as stated at the hearing at Danville, Ill.

By the MASTER: He may state the general reasons.

A. The gas and oil business is rather hazardous business and the
early developer of any field wants, in the event of any reasonable
success, to have some certain claim on the field. In the event of fail-
ure he wants his leases to be in such shape that he can be relieved
of any responsibility by getting out. It is a singular business and
extremely hazardous and would be utterly impracticable with any
other form of lease than that which would enable the operator of
that property to give it up at will.

Q. Well, at this point, I would like to ask you whether the prac-

tice of leasing property in this way and paying a rental per acre per annum is an extensive practice?

A. It is, I think, in operation almost entirely in the oil and gas business.

Q. I would like to get some idea of the amount of money involved in the annual payments in that way?

A. I presume they—in the matter of West Virginia I would hazard a guess that the rentals paid on that acreage run over a million and a half or two millions a year. I am connected with the Manufacturers Light & Heat Company and my judgment is that they are paying \$250,000 to \$300,000 a year.

Q. In West Virginia alone?

A. In West Virginia and part of Pennsylvania.

Q. What is the fact, Senator, whether it is practicable to determine, without drilling, the presence of oil or gas? Is there any other way of finding out than by actual drilling?

A. No other way than the early development.

Q. And then, as I understand it, oil or gas either, or both rather, are found in pools of varying size?

A. Yes, sir.

Q. Now, does the drilling of a well, or of more than one well indicate the extent of the field, when it has been ascertained that there is gas or oil there by the drilling for instance, of one well?

A. Not at all.

Q. How does the operator, then, determine the extent of the field for the purpose of indicating the wells which should be drilled or the properties which should be drilled?

A. They drill on theories which they build up themselves, and when there is a series of dry holes they quit.

Q. What I want to get at is whether it is practicable to drill the territory for purposes of operation completely in advance of an effort in the first place to determine to some extent the extent of the field and its general location?

A. No.

Q. In the actual testing of property what is the fact as to whether a large amount of work is necessarily done in the way of exploration which results simply in dry holes and is a total loss?

A. Well, quite frequently, in a great majority of cases, what is known as a wild-catter loses money.

Q. By a wild-catter you mean the man who goes out and searches for new fields or drills holes in an effort to extend the limits of a known field, do you?

A. Yes, sir.

Q. And is the expense so involved, without going into details of it, a large one?

A. Very large; yes, sir.

Cross-examination by Mr. HINDMAN:

Q. Referring to the surrender clause, Senator, as I understand it, the purpose is to so formulate a lease that the person taking it may,

when he desires to do so, be relieved from further liabilities, and at the same time have such a lease that, if it proves desirable to do so he may hold the land owner?

A. Yes, sir.

Q. That is the purpose of it?

A. That is one of the purposes.

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Testimony of Col. J. J. Carter.

Col. JOHN J. CARTER, called in behalf of complainants, sworn, testified as follows:

Direct examination by Mr. BEAL:

Q. Where do you live

A. At Titusville, Pa.

Q. In what business have you been engaged and are you now engaged?

A. The oil business.

Q. For how long?

A. From 1868 continuously, since that time.

Q. Has that been practically your exclusive business?

A. No, sir; it has not been my exclusive business.

Q. Have you given a great deal of attention to it?

A. I have given most of my time; but I have had incidental business. It had been my main business.

Q. In what fields have you had experience?

A. I have operated in the states of New York, Pennsylvania, Ohio, California and Japan.

Q. And West Virginia?

A. And West Virginia.

Q. Have you a knowledge of the oil business in the state of Illinois and a familiarity with the business there?

A. Only a general knowledge. I have no personal knowledge, because I have never operated there.

Q. Have you kept yourself in touch with the business there and the manner in which it is conducted?

A. Yes, sir.

Q. And you are familiar with the character, in a general way, of the leases which are taken from the land owners and under which the Operator is operating for oil and gas?

A. Yes, sir.

Q. Are you familiar with what is known as the surrender clause in leases?

A. Yes, sir.

Q. I wish you would tell the Master the reasons, if any, growing out of the nature of the business, which has led to the introduction and use of that clause?

A. I, perhaps, am the author of that clause.

Q. Go ahead.

272 A. Taking the old form of lease they used here in Pennsylvania originally, they had a surrender clause which was found inoperative in many cases, because when we came to drill wildcat wells and thought we had something the nature of the lease and the decisions of the courts were such that somebody else got the product of our labors. We would drill up to a certain point on a block of leases that had been acquired and at a great expenditure of money and time and then when we had what was called a show, somebody else on the opposite side of the fence would come up and take the product of our laborers, so the leases were amended from time to time so as to cover those points. Now, perhaps it might be said that I have had more than a million of acres of land, in my experience, that I have leased, and that less than 60,000 acres of that million of acres have been found unproductive, and it was therefore absolutely necessary, while paying from \$150,000 to \$200,000 a year for the leases mentioned, that I have a clause that protected me, so when I expended that much money, and perhaps that much more, the wildcatter would not have the benefit of my labors and money, and it became necessary that this clause should be introduced and the clause was introduced and changed many times until it has gotten into its present form.

Q. And by its present form you mean a lease whereby the land owner received a rental per annum, and on the other side the operator or lessee has a right to surrender the lease and terminate the obligation upon the payment of a sum of money, and I am satisfied that if it had not been for the introduction of that clause millions of acres of land that have been tested and hundreds of thousands of barrels of oil would still lie dormant.

Q. Would it be practicable for men of the necessary means and responsibility to undertake to prosecute the search for oil in new districts without some provision of that sort?

A. No, sir; I can answer that emphatically and I can illustrate that.

Q. Go ahead in your own way.

A. At the present time the company of which I am president has under lease about a hundred thousand acres. That is embraced in the states of West Virginia and Ohio and in many counties thereof. The operations many times are more than 150 miles apart and are of large extent, and are taken up to the best judgment of myself and my operators and large blocks of leases given. I have
273 surrendered within the last year more than thirty thousand acres of land that I have taken up and paid rentals on from one to five years—some of them ten years, at a large expense. I had drilled many wells in order to determine the value of it, but unfortunately I got on the wrong line and had to surrender those leases. I took up other leases on the North and West of those leases, and in the last year have succeeded in striking five different pools of oil, and in that way, by drilling wells, and by other people drilling wells I was enabled to determine the profit. That resulted in a profit, or will in time, and the other resulted in a loss. If my

company had not been one of means it could not have done it. would have bankrupted an ordinary man to follow the proceeding.

Q. What is the fact in the actual development of a pool, or the limits of a pool after it is discovered, as to whether it is practicable to drill the whole territory or whether you first search for and endeavor to determine to some extent the limits of the property?

A. It is not possible for any man to determine how great the extent of the sand below is by the drilling of one or a number of wells. You must first determine whether you have the rock in which the oil is stored and you must determine whether the rock is a productive one, because the rocks are not all productive, and you must determine by a series of wells what direction the rock is trending. I can illustrate that, if you like.

Q. I wish you would.

A. In the state of Ohio we have one farm, among many, called the Mollinoux (?) Farm. We have *have* had that farm of 35 acres of land for about ten years. On that farm we drilled several dry holes and one small well. I never expected to get any oil after having expended so much money, yet, at the same time, an individual went on the North of that farm and accidentally struck a well. I then came to the South of his well and drilled five wells, two of which are good producers and three dry holes. I then came on the Adams farm to the West of that and put down a twenty-five barrel well. I then put down Number Two on the same farm and got a 1265 barrel well that is doing 500 a day now. It developed the Mollineaux farm in such a way that we drilled on there and drilled on the Adams farm so that now it is a very valuable farm but if that surrender clause had not been there I could have been deprived of the benefit of my large expenditure, which I am now likely to get back.

274 Q. Does the development of the pool and its limits, after you ascertain the presence of the oil bearing rock require considerable time for investigation?

A. Yes, a very considerable time, and so much that no one individual or no one field can determine just how much, because you may get into it very rapidly or it may require a very long period of time before you know what you have got.

Q. I suppose the rapidity with which operations may be prosecuted depends upon local conditions and upon weather conditions and the season of the year?

A. The season of the year, condition of the roads, weather, and means of transportation all enter into that.

Q. And what has been the result of the use of the present form of lease, involving the payment of a rental per annum, with the right upon the part of the lessee to surrender upon paying a consideration—upon the lessors, that is?

A. After the surrender, and the payment for so doing, the lessor has been able, at many times, to lease his property to other parties without let or hindrance, and without that clause, he would be in doubt as to whether the lease was yet in operation.

Q. I also want to know whether it has given a stability to the

business and produced a better feeling on the part of the lessors whereby the business has been conducted in a more satisfactory manner?

A. I think I can answer that in the affirmative without hesitation.

Q. Can you give us some idea of the amount of money involved annually in the rentals on this form of lease?

A. This company alone—the Carter Oil Company, had from \$125,000 to \$150,000 a year.

Q. From your knowledge of the extent to which that form of lease is used, could you give us any idea approximately—I don't mean definite figures, but does it run into millions of dollars?

A. I know one company that to my certain knowledge has paid more than a million a year.

Q. What company is that?

A. The South Penn Oil Company. I don't know that they are doing that now, but they have in the past.

275 Cross-examination by Mr. HINDMAN:

Q. You are the President of the Carter Oil Company?

A. Yes, sir.

Q. That is a West Virginia corporation?

A. It is.

Q. It is conducting a very extensive business in West Virginia, I understand?

A. Yes, sir.

Q. A subsidiary branch of the Standard Oil, is it not?

A. Well, so considered at the present time. It was my original company. John J. Carter owned it all at one time.

Q. How, speaking, Colonel, about wildcat territory, that is an expression that is generally understood by people who are engaged in the oil business, but possibly is not so well understood by persons who are not so engaged. By wildcat territory is meant territory that has been undeveloped and the presence or absence of oil has not been determined by any operation?

A. That is known as wildcatting.

Q. And a wildcat well is a well put into such territory?

A. Yes, sir.

Q. And a wildcat lease is a lease taken upon lands where the presence of oil or gas has not been demonstrated by operation?

A. That is as it is understood.

Q. In that vicinity?

A. Certainly.

Q. Where a lease is taken on purely wildcat land the rental is merely a nominal sum?

A. Not always.

Q. The rental fixed in a lease on such territory is governed by the prospects of oil or gas?

A. Yes, sir.

Q. In purely wildcat territory the rental would be a mere nominal sum?

A. Not necessarily so.

Q. Do you know of any leases being taken for a substantial sum?

A. Yes, sir.

Q. What sum do you call substantial?

A. \$2,000 for a hundred acres.

Q. In territory where it was purely wildcat?

A. Purely wildcat.

276 Q. Where?

A. In the state of West Virginia—that is, bonus.

Q. But not rental?

A. Then the rental would rise out from that to \$5.00 an acre in a year. That is only in certain places. I don't say it is universal.

Q. And in such places as that other developments point conclusively to the presence of oil?

A. Not exactly. That wouldn't be of itself necessarily so. At any rate, if you tell me what you mean by pointing, I might answer the question more definitely.

Q. I mean by that, territory which from surrounding developments would probably produce oil?

A. Then that is not wildcat territory.

Q. Then, let us define the boundary between developed and wildcat territory? You mean by wildcat territory, such land as it is absolutely undetermined whether there is any oil in that vicinity or not?

A. Yes, sir.

Q. Such as to go into the middle of the State of Iowa?

A. What would be wildcat, sure.

Q. Absolutely?

A. Sure.

Q. Do you know of any sane person or any corporation that would go into such a place and that wouldn't become bank- inside of a year, that would pay \$2,000 bonus and \$5.00 an acre for such territory, if you could get a whole state?

A. I don't believe it would be possible for any man to get the whole state.

Q. If it were possible.

A. It is not possible.

Q. To take one acre, would any person engaged in the oil business give \$2,000?

A. I think he would be very foolish. We are talking about the state of Iowa, remember. This answer does not apply to the state of West Virginia, or Illinois.

Q. No; West Virginia has been pretty well developed for oil. It has been producing there for years?

A. A great deal of it yet is wildcat.

Q. The customary rental in wildcat territory, undeveloped, where there is no production to indicate whether there is or is not oil or gas is about 25c. an acre, isn't it?

A. I have known it to be as low as 10c. and I have known it to be as high as \$2.50.

277 Q. This surrender clause, Colonel, you say the purpose is to enable the operator to develop wildcat territory?

A. Yes, sir.

Q. You gave an illustration of an Ohio lease where you had drilled a number of dry holes and the venture looked like a failure, and afterwards some other person on some other land made developments that showed a portion of this lease to be valuable. Do you say that that was saved to you by reason of the fact that the lease had a surrender clause in it, and how do you explain that fact?

A. Simply this: If I had not had the clause there and stopped operating on that matter, then I wouldn't have had the lease, because the man would have taken it back after I stopped operating on the property. I had not operated on there for ten years nearly—may be mistaken, nearly ten years—or quite a long time.

Q. Were you paying the rental during all that time?

A. I was not, and for the very reason of this clause.

Q. The surrender clause relieved you of paying the rental?

A. One portion of it did. Another portion that provided that if I had a well drilled on the property, productive or unproductive, I would hold the property for the term of the lease.

Q. Then that was your contract, and not the surrender clause?

A. The surrender clause is part of the contract.

Q. Then the surrender clause was not what held it, but you held because of an agreement that the well should be drilled.

A. I had a dry hole there.

Q. But under this contract this hole held the lease?

A. No; you are going a little too far. I told you I drilled a well there and that held it. I said if I hadn't had that surrender clause I couldn't have maintained the block of territory around it. That is what I mean.

Q. The surrender clause is for the purpose of enabling you to lose and not retain the land?

A. I understand; but in holding this same property, if I had not had the opportunity to drill the other wells in that vicinity and surrender thousands of acres of leases in that county and other counties adjoining, I could not have developed that property. I surrendered thousands of acres and drilled hundreds of wells.

Q. Does your experience, Colonel, as an oil operator of wide experience, prove to you that the rentals and bonuses paid in producing territory are much greater than the bonuses and rentals paid in wildcat territory?

A. Yes; that is true.

Q. And the rental decreases in accordance with the development lack of development. That is, if there is no development indicating the presence or absence of oil, the rental is correspondingly lower than where there has been no developments?

A. That is true.

Q. Then it is the land owner that assumes the risk, in the small rental he received?

A. On the contrary, it is not. The conclusion you have reached is not founded upon facts. In the first place, the land of the farmer who rents under wildcat conditions, is not injured by the lease,

and it is just the same as finding so much money until the operation goes on, then he is given $\frac{1}{8}$ or $\frac{1}{4}$ royalty, but he is given ample compensation for the amount of risk. The money is paid by the operator. He taken the risk—a great big one. I have leased land myself to operators and have reaped more genuine profit than in any other way, by making them go to the expense of operating, and giving me a royalty and the rental. It is not so essential to have a surrender clause in developed or producing territory, as in wildcatting. In the first place, you want to understand when you develop territory you don't want any surrender clause, because you are entitled to go on and develop as much as you please.

Q. Your theory seems to be that the surrender clause enables you to hold on and go on. As I understand it, it is the provision which enables you to terminate at will.

A. You have been talking about wildcat, and now you bring me into productive territory. I don't want to surrender productive territory.

Q. The lease on such territory is generally taken up by persons who go in advance of the operator and take up large blocks of territory at a nominal rental and hold them awaiting the development that is to follow, if it should follow?

A. I don't quite agree with that conclusion either. I never took up any territory in that way, neither do I know——

Q. I am talking about the fellow that does go in advance?

A. Who is that fellow?

Q. The wildcatter.

279 A. I am a wildcatter; but I have never operated in that way.

Q. Large expanses of West Virginia were taken up by persons who held leases, but had no intention of holding and developing it?

A. No; that is not true.

Q. Can you point out a single field where that is not true?

A. It is not true as far as I am concerned. Whom do you refer to?

Q. I refer to the fellow who is not an operator.

A. I don't know him.

Q. Don't you know there are people engaged in the business of taking up leases and hold them until they can find a purchaser, and when they took the leases they had no intention whatever of making any development themselves. In other words, leases taken principally for speculative purposes.

A. I don't know personally such an individual. There may be those, but I don't know them.

Q. Now, in wildcat territory leases are usually taken for a definite time, are they not?

A. Yes, sir.

Q. Say from five to fifteen or twenty-five years, as long as the person taking the lease can get?

A. No, sir; not quite as far as that. Twenty-one years is as long

as I ever knew a lease to be. If they were taken longer than that I might not know it.

Q. Now, the purpose of the surrender clause is that if developments should demonstrate the presence of oil or gas, the person taking the lease, or buying the lease, may hold that lease during a definite term and also as long thereafter as oil and gas is found on the premises?

A. Yes sir.

Q. But the real purpose of the surrender clause is that in the event that it should be demonstrated that there is no oil gas in that vicinity the lease may be surrendered—handed back to the lessor, and liability for the land rental, so called, would thereupon cease?

A. Yes, sir.

Q. That is the purpose of it. In other words, by this surrender clause, it is the desire of either the speculator or operator, by whatever name he may be called, to have a lease that will bind the land owner but leave the operator free to terminate at will?

A. I don't think that is the purpose of the clause.

280 Q. That is the effect of it, isn't it?

A. No, sir; not to-day. He can surrender by paying a certain amount of money for the surrender.

Q. You mean by a surrender clause, a provision placed in a lease whereby a lessee may terminate the lease at pleasure?

A. By paying the lessor a certain consideration. It is a part of the contract.

Q. And the purpose then is, to have such a lease as will bind the lessor for as long a period of time as is named in the lease, but will enable the lessee to terminate it at any time before the expiration of that period.

A. True, with this consideration, that it enables the man who has spent his money for the rental and testing the territory to have an opportunity to save himself and get his money back.

Mr. SIMMONS: You say you have been connected with the oil business in some of its forms ever since 1868?

A. Yes sir.

Q. I understood you to say that so far as you know, you are the author of the original surrender clause.

A. Yes, sir; as it is in the leases now carried out.

Q. When was it that you shaped and formed the surrender clause about which you spoke?

A. I can't answer the question as to detail, but since I came into Virginia.

Q. I want to know about the year.

A. I couldn't tell you that, because I have been continuously operating—

Q. I know; but tell me just as nearly as you can when that year was.

A. I can't tell you.

Q. Can't you give the Master some idea?

A. It was within eighteen years.

Q. Colonel, can you give us the exact wording of that surrender clause, as you framed it?

A. I can't do it.

Q. Give it in substance, Colonel.

A. I will give it if I can get any of the leases from my company. It is beyond my power of remembrance to give the wording off hand. I simply put that in writing and then dismissed it from my mind. There is not an author in the world who could repeat his own books.

Q. I know; but such a thing as this is different.

A. The surrender clause has been changed no less than a hundred times.

281 Q. Give us the substance of it.

A. I can't do it. It is out of the question for me to give you that.

Q. Did your surrender clause, as it was originally written read something like this: "The party of the second part hereto agrees to drill a well within one year from this date, or in default thereof to pay the party of the first part the sum of one dollar per acre per annum until said well is drilled. If said well is not completed or said rental is not paid, then this lease shall become null and void between the parties hereto."

A. While the language you use is not as I remember it, the substance is practically the same.

Q. It is the clause in substance. Can you suggest where it differs from yours?

A. I am not going to give you anything for your benefit or anybody else's that I can't give exactly. I can't give it to you, sir.

Q. Then, although you think I have not given it verbatim, you can't tell where I failed to give it as you wrote it?

A. No, I can't; because you ask me as I originally wrote it. That is many years ago and I have amended it many times.

Q. What objection did you find to the original clause as you wrote it, which I have given in substance, which caused you to change it?

Objected to by counsel for plaintiff, as irrelevant and not cross-examination.

By the MASTER: Let it go in.

Question read.

A. Well, as I recollect, now, decisions in the various suits had determined the question and it was necessary to conform to the rulings.

Q. The objection to that clause was, that by the decisions of the Supreme Courts of Pennsylvania and West Virginia, an oil man was held for the term mentioned in the lease, for the payment of the rental, and could not surrender. Wasn't that the objection.

A. I think something after that order, practically.

Q. So, in order that the oil man could hold the land owner and yet loose whenever he wanted to, you found it necessary to change that clause.

A. I made it so.

Q. Give me in substance now, the surrender clause, as you first amended it, after you found the original inoperative.

282 A. I cannot do it.

Q. Then the amended surrender clause read something like this, as you prepared it, didn't it: "In case no well is completed within one year from the date hereof, then this lease shall become null and void unless the party of the second part shall thereafter pay a rental of \$1.00 per acre for the term mentioned in this lease."

A. That was the substance of the clause as we amended it secondly, or thirdly or fourthly. I don't know whether it was firstly, secondly or thirdly. I don't know when the first amendment nor the third amendment occurred.

Q. If I have not quoted that clause as you amended it, when you made the first amendment, tell me where I am wrong.

A. I can't tell you. I can't tell you whether it is the first or second amendment. I only know that my methods were to amend those as the conditions warranted from time to time; but I can't tell you when it was done.

Q. I want to know what your second surrender clause was. Haven't I quoted it correctly, substantially as you made it?

A. I don't know, because I don't know what time that came in.

Q. You were watching the decisions of the Supreme Courts of the states, and that is what caused you to make your first amendment, as you have told me?

A. Yes, sir.

Q. You kept continually watching the Courts, didn't you, in your business?

A. Yes, sir.

Q. Now, the amendment, as I quoted it, you found to be faulty, didn't you?

A. I know it was faulty as compared with what it is now.

Q. The fault you found with the amendment as I have quoted it, was that the Supreme Courts of Pennsylvania and West Virginia held that to be a unilateral clause which did not bind the land owners?

A. I do not know that in the particular clause that you speak of. It may be true, but I don't know it. I am not a lawyer, you know.

Q. And you found it necessary to have that amended, under your own observation and the advice of your lawyers?

A. Yes, sir.

Q. The reason it had to be amended was the reason I gave you.

283 A. What was that reason?

Q. That it was a unilateral clause and did not bind either party.

A. I never used that word "unilateral."

Q. Well, it made the lease void?

A. That is all right.

Q. Then you found it necessary to invent another surrender

clause. Now what was the next surrender clause that you invented after the supreme Courts of the different states had passed on the clause that I last gave you?

A. I can't give it.

Q. You drew it?

A. I did.

Q. How often did you amend the surrender clause in order to keep up with the Supreme Courts?

A. I can't answer the question. I don't know.

Q. The truth of the matter is that all along the line, from 1868, or from the time you began, you were endeavoring to draw a surrender clause which would bind the farmer and would not bind you?

A. No, sir; I never did, and the one that is here now does not.

Q. Now, we will come to more recent dates and happenings. I wish you would tell the Master what form of surrender clause, giving it in substance, that you use right now.

A. If the Master will permit me to get one of my own leases I prefer to present it. My intention is to give you exactly the facts.

Q. Is this the clause that you use: "It is agreed that the second party is to have the privilege of using sufficient water from the said premises to use the machinery necessary for drilling and operating thereon, and at any time remove all machinery and fixtures placed on said premises; and further, upon the payment of one dollar at any time, by the party of the second part, heirs, successors or assigns, to party of the first part, heirs, successors or assigns, said party of the second part, successors, heirs, or assigns, shall have the right to surrender this lease for cancellation, after which all payments and liabilities thereafter to accrue under and by virtue of its terms shall cease and determine and this lease become absolutely null and void." Is that in substance your clause?

A. Well, it is badly mixed up as to my clause. It does not follow continuously. It is trying to follow it.

284 Q. You don't want the Master to understand you ever got up such a clause as that?

A. Yes, sir; the most of that clause is taken from my lease.

Q. You don't mean to give the Master to understand that you mean to say that there is any uniform surrender clause used all over this country?

A. I could not say that.

Q. They are just about as various as the leases?

A. Yes, sir.

Q. Every fellow gets up his own form?

A. Not that; because every fellow has not had the experience to guide himself. I wouldn't answer that, that every fellow did that.

Q. What I do want you to answer is, you don't mean to say that there is any uniform surrender clause?

A. I will answer that emphatically; I think that is right.

Q. I have another surrender clause here. "The second party shall have the right to use sufficient gas, oil and water to run all machinery for operating said well; also the right to remove all its property at any time, and may at any time, on payment of \$1.00 to the party of the first part, surrender this lease for cancellation, after which all payments and liabilities thereafter to accrue under and by virtue of these terms shall cease and determine." That is your clause, isn't it?

A. No, sir.

Q. That is another surrender clause? You recognize the feature of it?

A. I tell you, if I saw an animal walking on the street and would see it was a big hog and I tell you I saw a hog, it might be a big hog or a little hog, but it would still be a hog.

Q. And if it was a camel it might have one hump or two humps.

A. That has a hump and that is the hump and that tells me it is not mine.

Q. You also see the hump which shows you it is a surrender clause?

A. Yes, sir; but that is not mine.

A. Yours you still find different?

A. Yes, sir.

Q. Then there are at least three?

A. Yes, sir.

Q. You don't know how many more?

285 A. No, sir; I don't exercise any jurisdiction in that matter at all.

Q. Now, in your surrender clause, whatever the wording may be, you provided some consideration for the right to surrender?

A. Yes, sir.

Q. One dollar, or something you and the farmer agreed upon?

A. Yes, but it was more than one dollar in most.

Q. It may be five.

A. It has been.

Q. Any more.

A. It has been.

Q. Just as you and the farmer agree?

A. Yes, sir.

Q. Then, you put that in in order to try to get the courts to hold with you that you were giving a consideration for the right to surrender?

A. No, sir; that's not it. If you want my reason, I will give it to you.

Q. What did you put the \$1.00 or \$5.00 in for?

A. Simply because it was a contract between a lessor and a lessee.

Q. But after all, the reason why you put it in—

A. Was to protect myself.

Q. Was to make the surrender clause, as you thought, valid?

A. Yes, sir.

Q. And by doing that you thought you would get the courts to hold that the surrender clause would hold and was not null and void?

A. I would like to answer that question yes, but I am not trying to get the Courts to do it, because I am not a lawyer.

Q. Do you know anything about the Seibert lease in Illinois?

A. No, sir.

Q. Do you know a man by the name of Seibert went to Illinois and leased over 30,000 acres and in the leases there was simply a rental of 25c. an acre provided for?

A. No, sir.

Q. You don't know anything about those leases?

A. No, sir; I do not.

Q. Then do you know the Benedum & Trees Oil Company took leases in Illinois?

A. I know they told me they did.

286 Q. Didn't you buy some of those leases?

A. I did not.

Q. Don't you know they leased for ten cents per acre per annum?

A. I do not.

Q. Well, Colonel, there was something said by you about bonuses. This bonus, in oil parlance, is the amount paid in cash at the time the lease is taken?

A. Yes, or an agreement later on, by note or otherwise.

Q. It is the consideration for the lease?

A. Yes, sir.

Q. And the rental, as you term it, and as you mean by the testimony, is the sum that is paid per agreement to perpetuate the lease?

A. Yes, sir.

Testimony of A. B. Dally, Jr.

A. B. DALLY, JR., called in behalf of plaintiff-, sworn, testified as follows:

Direct examination by Mr. BEAL:

Q. Where do you reside?

A. Pittsburgh, Pa.

Q. What is your business?

A. I am engaged in the oil and gas business.

Q. With what company or companies are you connected?

A. General Field Superintendent of the Manufacturers Light & Heat Company, and affiliated companies.

Q. Is that a company largely engaged in the supplying of natural gas and the production of oil?

A. Yes, sir.

Q. In what fields does that company operate?

A. It operates in Pennsylvania, Ohio and West Virginia.

Q. Does it operate extensively.

A. Quite extensively; operates a large number of wells.

Q. How long have you been connected with the oil and gas business?

A. More than twenty years.

Q. With what fields do you have experience?

A. My experience has been in the fields of Pennsylvania, Eastern Ohio and West Virginia.

Q. Do you have a general knowledge of the Illinois fields and of the business as it is carried on there?

287 A. Just a general knowledge of Illinois, from some developments I have been interested in, and connections with others operating in the field.

Q. You have some interests in the Illinois field, then?

A. Yes, sir.

Q. Are you familiar with the general form of oil and gas leases used now in the conduct of the business?

A. I am. I have seen and gone over more of the forms used in the fields of this vicinity, Pennsylvania, Ohio and West Virginia, than I have of those in Illinois, and I have looked over those leases and have territory taken up in Illinois.

Q. What is the usual practice in taking oil and gas leases, as to whether the leases generally are taken upon a plan whereby they provide for payment of a certain rental per annum per acre, and also contain what is known as a surrender clause?

A. It is the common and usual practice to take up leases or blocks of land on a form that permits of them being carried under a land rental, with a surrender clause in the lease that will permit the operator to surrender the lease if he doesn't want to hold the territory.

Q. What are the reasons, in the conduct of the business, which have led to the adoption and use in that way of the so-called surrender clause?

A. I presume the introduction of the surrender clause was after perhaps a failure of an operator to give up a lease that did not have a clause in it, or in which a suit may have been brought to compel payment of the rental through the entire period of the lease.

Q. I was wanting to direct your attention more particularly to the practical reasons in the actual conduct of the business and any necessity which existed in the conduct of the business for the presence of such a clause.

A. The necessity for the surrender clause was to enable the operator to drop the property and release him from an obligation to pay rental, after the property had been either condemned by drilling done by the operator holding the lease or by other developments of other properties in the vicinity of the property. In other words, he takes up a block of land and drills a test well, is the usual practice, and if the sand formations are worthless, or found to be run out, or barren, it enables him to be released from the obligation to hold
288 that land, and it is one of the prudent things that all operators do in leasing up large blocks of land, or, in fact, leasing any land for oil and gas purposes, is to have the means in the contract that he can be relieved of the payment of rental on worthless territory.

Q. Are those payments of rentals of such magnitude that they would become onerous if required to be paid on unproductive territory through a period of years?

A. I don't believe there are any companies or operators who could pay the rental payments, whatever they may be, on the large blocks of land that are usually leased, if he were compelled to keep them up through the entire term of the lease. The profits of the business wouldn't warrant it. It is only done, I think, where the territory has been leased—a block of leases has been proved to be productive, then it is presumed that in the final round-up he can take care of it.

Q. Can you give us any idea in dollars and cents, of the extent to which rentals are paid on leases?

A. Well, speaking of southern Pennsylvania, Western Ohio and West Virginia, I presume from two to two and a half million dollars are paid out annually in those three states, carrying rental to the land owner.

Q. Why is it necessary for you to have a large block of property in operating?

A. Well, to warrant the large expenditure made in drilling.

Q. Is the development of existing pools, the determination of the extent to which they are productive territory, and the location of new pools a matter that involves a large expense, or otherwise?

A. It generally is a large expense, based on the depth the wells are drilled. After making such an expense the operator wants to know that he has sufficient territory to extend his operations.

Q. And is there or not a large amount of drilling necessarily done which is entirely unproductive?

A. There was a great deal of unproductive drilling done, known as wildcatting.

Q. Is this unproductive drilling and the finding of dry holes limited to wildcatting, where you go out and search for new fields or is it necessarily true of the field where you find it to be producing territory?

A. The drilling of dry holes follows the business clear through, both in the wildcat and developed territory. It is one of the hazards of the oil and gas business. A large number of dry holes are drilled which are a complete loss to the operator.

Q. Is it practicable in the development of a field and the ascertainment of the extent or limits of the field to drill the wells immediately, or is it a matter that involves a period of time and a continued search?

A. No one well really determines the value of a block of territory. It requires sometimes half a dozen to locate what the operator hopes to find—either oil or gas—in different directions from the initial well, and that is based on the character of the sand formation and the show of oil or gas that may be found in any of the wells. That sometimes covers a period of several years before it can be done to his satisfaction.

Cross-examination by Mr. HINDMAN:

Q. We have been enlightened as to the meaning of wildcat territory and wildcatting, as used in the oil business. There is another expression I presume from your experience you can give us some

light upon, and that is the word "scalper." What is the meaning of that, and how is it applied?

A. The term scalper is sometimes applied to some individual who may lease up land in a locality and bring the territory to an operator and dispose of his leases to the operator who takes his place as the lessee or the assignee of the lessee and performs the operating work.

Q. That is really a part of the business carried on in all oil fields that you know anything about, isn't it—the scalper?

A. I know there are people who lease land in all the fields that are opened up; but I don't know that they continue to do that as a business. They may hope to be an operator with the block of land they first take up, but, based on their financial ability, they dispose of the lease if they can't operate themselves.

Q. Persons go into a field partly developed, or a purely wildcat region, take up a block of leases at as low a rental as they can agree upon with the owner, and for a term as low as possible, with a view of selling those leases or holding them until somebody else shall make developments for oil and gas, and that is what is known as a scalper?

290 A. Quite often that is done.

Q. Leases taken by scalpers usually have a provision in them some place, usually at the close, "That the terms and conditions herein expressed shall extend to the parties hereto, their heirs, executors, administrators and assigns." That is put in there in order to enable the persons taking them to sell or negotiate them?

A. Yes, or to have the contract extend to the purchaser of the leases.

Q. Now, a lease taken by a scalper, for the purpose, not of development, but of speculation, would be of little value to that speculator or scalper without the surrender clause, isn't that true?

A. I perhaps might say it would be of little value. When he came to the point of disposing of those leases to an operator, the operator would want the surrender clause in the leases.

Q. A man who is taking leases with the intention of putting down a well, with the intention of making a development, it is material to him whether there is a surrender clause or not?

A. I don't agree with you. I don't believe any prudent operator will take territory at any time, which does not convey the right to surrender.

Q. If the lease was taken with the intention of making a good faith development, would you explain what advantage would be gained by a surrender clause?

A. A surrender clause in such a contract of an absolute agreement to drill would not be necessary.

Q. Leases taken in good faith, with a view of making developments, have this provision, that the rentals are to be paid until a well is drilled, and that the rental shall cease upon the completion of the well. That is true, isn't it?

A. Generally,—different forms of it.

Q. If the completion of a well terminated the liability for rental, what is the purpose of the clause?

A. Well, it is deemed prudent in the oil and gas business to have the right to surrender up that instrument, whatever that may be, and it is a cleaner way to do business and I think a more prudent and proper way to do it, so all the operations between the operator and the land owner are ended.

Q. So, taken all in all, the surrender clause is for the benefit of the fellow who takes the lease expecting to hold it to await developments by other people, and for the purpose of selling it to operators for purely speculative purposes?

A. I don't agree with you in that statement, as the operator takes the place of the first lessee; but prudent oil and gas operators would drop the land if it is unprofitable as well as a scalper.

A. And the only way to determine whether it is profitable is to put a hole into the earth?

A. Yes, sir.

Q. And in the ordinary lease that terminates it?

A. Yes.

Q. Then, it is only beneficial where the intention is not to make immediate developments, whether it be by scalper or operator?

A. To hold the property until development is made and determine its value to the operator spending the money.

Testimony of J. Worthington.

JOHN WORTHINGTON, a witness called in behalf of the plaintiff, sworn, testified as follows:

Direct examination by Mr. BREAL:

Q. Where do you reside?

A. Pittsburgh.

Q. What is your business?

A. Oil business.

Q. How long have you been engaged in the oil business?

A. Since 1865.

Q. With what company are you at present engaged?

A. South Penn Oil Company.

Q. How long have you been with that company?

A. Twenty years.

Q. Is that company largely engaged in the production of oil?

A. Very largely.

Q. What is your position with the company?

A. Assistant General Manager.

Q. What oil fields has your experience embraced?

A. I believe about all the fields, beginning with Alaska and down at the Isthmus of Tehauntepec.

Q. You have a knowledge of Illinois?

A. Yes, sir.

292 Q. Do you have a knowledge of the general character of the leases in use in those fields, made between the land owner and the operators for the development of the property?

A. I have, a general knowledge.

Q. I wish you would state what the fact is as to whether it is usual and customary to insert in oil and gas leases what is known as the surrender clause, whereby the lessee and his assigns have the right, under certain terms, to surrender the lease and to terminate any further liability?

A. It is an absolute necessity.

Q. Why?

A. There is not a single one will accept a lease with- the surrender clause in it to terminate the liability. In leasing, there is a bonus usually paid. There are two conditions that come with that, and one of the two is in operation continuously. Either you pay a land rent or you pay a royalty, and one obtains continually, and the purpose of the clause is that you can terminate these conditions by a surrender of the lease. You pay a land rental until such time as the owner receives a royalty. You are given a time in which to drill a well and the usual length of that is one year and the length of a lease is five years. That is the usual time and terms and conditions of a lease.

Q. I wish you would explain a little more fully why this surrender clause is inserted.

A. The oil lease evolved with the oil business, and going back a little ways,—the old lease ran for twenty years. I believe in the early eighties a great deal of land was leased right in this state, and under our own supervision, a large block was leased for 21 years, and at that time there was no surrender clause in the leases. Those leases were taken between '85 and '86. Evidently rulings of the court were made that showed a liability that held and continued with the leases. A form of surrender was drafted by attorneys here, which I took into the field and visited each individual farmer and explained to him the character and nature of that surrender and the reason for asking it; that if after our efforts to secure oil, we got nothing, we could terminate the lease. That was the first I have any knowledge of. That surrender clause has varied from time to time, always, based, I assume, on decisions or rulings of the Courts, or laws as they were enacted; but no oil man, in my judgment, would be justified in taking an oil lease that did not have the surrender clause.

293 Q. Is the development of a field and the ascertainment of whether the various properties leased are oil producing properties, a matter which can be done quickly, or does it require a period of time?

A. It always requires time, and in regions such as this, a great deal of time. As a rule, the operator has more money invested in the venture than the owner of the land, many times over, as a rule.

Q. What is the fact, as to whether the exploration for oil producing properties, and the making of tests as to whether it is a producing property, is a matter costly to the operator?

A. Very, and always hazardous and always uncertain.

Q. Does that hazardous and uncertain condition or character continue to rule, even to the drilling done, in a general way, after a property is found to be a producing property?

A. Yes; that is the unfortunate part of it.

Q. It has been testified that it is desirable to have a large number of leases. Why is that? Is it the view of the fact that large losses have to be met?

A. Yes, sir it is an insurance on your business. Every man carries insurance in the oil business. If you go in to explore, this term wildcat is not properly understood. Any well, out in the open, in territory that is not tested, is called wildcatting. There is nothing to justify or prove that you will get results. So you carry a large bulk of leases because it is an insurance on the effort, and if you win you are entitled to the profits and benefits of its discovery. But it does not follow that you decide with one test. The company I have been connected with has often made a series of tests and all failures, and then ultimately found oil.

Q. It has been said that you have to make provision for the needs of your business. What is the fact as to whether oil fields are of long life or not?

A. That is variable.

Q. They do diminish.

A. Always diminish.

Cross-examination by Mr. HINDMAN:

Q. You have been actively connected with the oil business for a number of year?

A. Yes, sir.

Q. Where?

294 A. In Pennsylvania, New York, West Virginia, Ohio, Illinois, Oklahoma, Alabama, California and Mexico.

Q. I believe you said you took the first leases out among the farmers, containing a surrender clause?

A. No, sir; I made no such statement. I said the first that I saw. I have no knowledge of the other man. That was a good many years ago. That was in 1886, and it was supplemental to the original lease.

Q. Now, the operator first undertook to avoid liability by placing in the lease this kind of a clause: "In case no well is completed within a definite time, say six months from this date, this grant shall become null and void, unless the second party shall thereafter pay at the rate of whatever amount was agreed upon, per acre, until the well is completed"? That is the form that originally obtained in leases of that character?

A. That is your statement. I am willing to accept it. The language is yours, but that is close enough.

Q. In other words, a lease was prepared whereby an operator did not promise to do anything, either to put down a well or pay, left wholly optional with him, and if he failed to develop, the lease ended unless he elected to pay on for the purpose of extending the lease?

A. He agrees to drill a well within a specified time, always stipulated, it is true, in all of the leases.

Q. I will ask you if 99% of the leases until ten years ago did not

contain such a clause as this: In case no well is completed within the time specified, this grant shall become null and void, unless the second party shall thereafter pay at the rate of so much per acre until the well is completed. That is the wording, isn't it?

A. I think so.

Q. Leaving either or both optional with the lessee. Of course, in a lease of that character, there was no need of a surrender clause, because the matter was wholly within the hands of the lessee as to whether he expended a dollar either as operating or as rental. That was followed by a direct stipulation reserving to the second party the right to surrender by the payment of \$1.00 to \$5.00. In other words, after the Supreme Court of Pennsylvania had held that these "Unless" leases were nudum pactum and not binding upon either party, the form was changed, inserting a direct agreement to pay until the lease was surrendered, and reserving the right to surrender.

That is true, isn't it?

295 A. I don't know. That is your statement. I am here as a witness; but I can't answer that long a question.

Q. You stated that you were acquainted with the general form of leases?

A. Yes, sir; but not being an attorney, I can't construe them.

Q. But the effort has been all along to go along and meet the law, so you had the right, under all the accrued obligations, to terminate that lease. I want to see how extensive that acquaintance of yours is with the various leases.

A. Yes, sir.

Q. When was the form changed from the "Unless" lease to the direct surrender?

A. I couldn't testify to that without going back to the leases.

Q. You know there was a change?

A. Yes, sir.

Q. From the "Unless" condition to the specific agreement?

A. Yes, sir.

Q. And that was because the Supreme Courts of West Virginia and Pennsylvania, and in fact, every court passing upon it, had held the "Unless" lease to be nudum pactum and binding on neither party, and that was obviated by putting the direct surrender provision, based upon a nominal consideration for the right so to do?

A. Well, I am not construing leases.

Q. That is your experience; it was changed from the nudum pactum feature to the direct stipulation, giving the second party a right to surrender?

A. Now, as a practical oil man, those matters are submitted to our attorneys. They had their reasons for changing them and we accepted them.

Q. I am asking you as to the fact, if the change wasn't made from the "unless" form?

A. At some period it was changed; but what year, I don't know.

Q. And you don't know what the purpose was in so doing?

A. No, sir.

JOHN GALEY, called in behalf of the plaintiff-, sworn, testified as follows:

Direct examination by Mr. BEAL:

Q. Where do you reside?

A. I live in Beaver, Pa.

Q. And in what business are you engaged?

A. The oil business.

Q. How long have you been engaged in that business?

A. Since 1865.

Q. And has your connection with the business since that time been continuous?

A. Yes, sir.

Q. Has that been your main, and practically your exclusive business?

A. Exclusively.

Q. What particular branch of the oil business have you been connected with?

A. With the development of oil territory.

Q. In what fields have you had experience? If you can I would be glad if you would tell me that in the chronological order.

A. You mean my different dealings?

Q. Yes.

A. Well, Pennsylvania, West Virginia, Ohio, Indiana, Texas, Kentucky, Oklahoma, Kansas and California.

Q. Did you include Illinois?

A. I never operated but very little in Illinois.

Q. Not extensively?

Q. I undertook to develop the country out there and fell down. I couldn't get my party to believe there was any oil there so I ceased my efforts.

Q. Were you one of the early operators?

A. Yes, sir.

Q. And you were a pioneer in the discovery of oil in Texas?

A. Yes, and in Kansas.

Q. Your experience, then, I assume, has been large, as to the matter of the form and character of the leases in use between the land owner and the party taking the lease for operation?

A. Yes, sir. That has been quite a serious point all the way through. We endeavored to get leases that we could hold
297 where we take large areas of land. In Kansas we had eighteen hundred thousand acres of land there which was practically continuous for 150 miles, and we had a provision by which we could hold those leases, and we went in with a drill and drilled 130 or 140 wells within a period of two years and we found we could not dispose of the oil we were producing and we had to let the thing go.

Q. Does the form of lease now in general use include the payment of a certain rental per annum, and ordinarily per acre?

A. Yes, it is based on the acreage and the price per acre annually.

Q. It is an annual rental?

A. Yes, sir.

Q. Irrespective of whether it is a gross sum or so much per acre?

A. It is an annual rental, and that rental paid in advance, as a rule.

Q. That rental, as I understand it, is a compensation to the land owner until such time as he becomes entitled to receive some share of the oil production or the gas production, as the case may be?

A. Yes, sir.

Q. Has the use of leases of that general character embracing these two matters, become almost, if not altogether, universal in that business?

A. It is universal now, and has been for a number of years.

Q. In the production of oil, what are the reasons why the party operating desires to have a large block of land and insists upon it?

A. The object is to compensate you for the risks you run.

Q. Are the risks large?

A. Extremely large.

Q. Do the payments of rentals required to be paid, amount to a large sum of money?

A. Yes, sir; of course it depends on the acreage that you are holding on the lease.

Q. I am not speaking of any particular person. I am speaking of the total rentals that are paid under this plan. Are the rentals received by the land owners a large amount of money?

A. A very large amount.

Q. Could you give me any idea of the amount?

298 A. It would be purely a matter of what a man thinks. I would say it is in the neighborhood of two and a half to three million dollars in rentals paid out, perhaps more. I mean annually.

Q. In the development of oil and gas fields, is it practicable to drill the whole field, or are you required to proceed gradually, to ascertain in a general way the limits of a producing field or territory?

A. Well, that would depend on the acreage you are trying to develop. Sometimes you might start a couple of wildcat wells and drill them in comparatively different sections, while if you only had a few farms, one well would be sufficient. The result of that well might give you some idea as to what direction to go for the second well.

Q. After you get one producing well, what is the next step?

A. Well, the next step is to try to follow it up. You figure in your own mind that the belt runs in that direction. The oil is found in belts or pools. You go in that direction and you get a dry hole and you know it don't go that way and you go in another direction, and you may have to go in four different directions before you give it up. You might get four dry holes and one producer in the middle.

Q. Is it practicable from the standpoint of cost, to drill wells that would take the oil out of the ground, until you have discovered

in a general way the direction and extent of the pool? Does the search have to be prosecuted gradually, in view of the expense involved?

A. Gradually, by all means gradually.

Cross-examination by Mr. HINDMAN:

Q. What company do you represent?

A. I don't represent any company. I am an operator myself. Mr. Guffey and I operate. We are the firm of Guffey & Galey.

Q. You operated down in Virginia for a number of years?

A. Yes, sir; and Pennsylvania.

Q. The West Virginia Field was originally leased principally by what are known as scalpers, was it not?

A. No, sir.

Q. Don't the Supreme Courts in their decisions say so? Isn't it a matter of common knowledge that the fields were taken up by scalpers who took it up for speculative purposes, and so declared in the Supreme Court of Pennsylvania?

299 A. I disagree with you there. That is entirely wrong.

Q. You don't know anything about the operations of the scalpers?

A. Yes, sir: I watched it all the way through from the early history. I am operating down in Southwestern West Virginia now.

Q. You bought leases, yourself, didn't you?

A. Yes, sir; I have bought whole blocks of leases and sometimes I have gotten a lease myself. I have had men out leasing for us and when we get a whole block we will go out and drill a well, or two or three or four.

Q. You know large blocks are taken by men who wouldn't have money enough to drill a well five feet deep?

A. That is true, to some extent, but when you come to embrace the whole state of West Virginia in a proposition of that kind it is not correct.

Q. That is done in all fields,—fellows go out who have money enough to pay the dollar consideration named in the lease, and take a lease. The public records in every county in which there is any oil show assignment after assignment, and very few that have not been assigned?

A. In some cases, of course. We have had them brought into our office frequently—two or three thousand acres. Sometimes they want to carry an interest. The first thing we do is look out for the lease. If they have a lease with the surrender clause we, of course, make a deal.

Q. If the lease contained a provision that the lease was only held until a well was completed—

A. That wouldn't matter. Suppose you have leases on six or eight farms and this well developes those. How are you going to hold those leases? You can't go onto six farms and drill six wells at once.

Q. Do you mean the surrender clause enables you to hold a lease?

A. It enables us to hold it until we develop it,—the payment of

rental, rather. As a practical way of looking at it, suppose you take six or eight farms and they were taken subject to the surrender clauses, and I cared to put a well down. That well will develop two or three of those farms, as this well might give me some idea where to go on the remaining land. We pay a rental on the whole thing until we determine that it is not any good and then we want to get rid of it.

Q. It is the agreement that you shall hold until it is developed that enables you to get the benefit of the development you have already made?

A. Yes sir.

Q. But it is the surrender clause that enables you to let loose when you have determined that it is no good?

A. Yes, sir.

Q. Now, wouldn't a provision in the lease that you were to pay until a well is completed, until the demonstration is made—wouldn't that furnish all the protection necessary, if the purpose was development?

A. You would have to go on that particular land, and that farm might be condemned by other farms.

Q. Then the purpose of the surrender clause is to enable you to hold it as long as you want to?

A. Just until we are satisfied that there is no oil.

Q. But you take your own time?

A. No; you have to be governed by the conditions of the lease.

Q. If you had a provision in the lease to hold the land and pay the rental until a well is completed, what would be the necessity of that?

A. You have to pay the rental on that until you drill on that particular farm, and you might have it condemned. That is why it is put in. I think it is a very unfair proposition to compel a man to drill on every man's land until he can tell whether he can get something. He can drill within a certain area to determine whether it is any good.

Q. But from the land-owner's standpoint. What protection has he?

A. He has been getting rental and he don't know whether he has a dollar's worth of oil under his property. I am paying rentals down in West Virginia now, a dollar an acre a year. They want that and don't want me to drill. They would rather take the rental than have me drill and maybe get a dry hole and not get anything.

Q. And you would rather pay it than demonstrate it?

A. No; we test it first. It would be foolish to carry a farm for several years and not test it.

Q. Where you take a lease in wildcat territory, you say the usual rental is about \$1.00 an acre?

A. It varies according to the remoteness from what is conceded to be an oil field.

Q. What is the rental?

A. It generally runs along about a dollar an acre per year.

Q. That is, wildcatting?

- A. Well, yes; that would be wildcatting.
- Q. Anything less than that would be simply with a view to hold it—simply taking a long shot at it, you might say?
- A. Well, you might call it that.
- Q. Sometimes you get as low as 25c. an acre?
- A. Yes, sir; sometimes lower.
- Q. Where the rentals are extremely low; there is no pressing necessity for making development, because the burden of carrying it would be slight.
- A. The present tendency isn't to make developments unless we have some reason to believe there is oil there. We would rather put the money into developments than to give it to the farmers.
- Q. However, you could hold it at a low rental in the hopes that somebody would put a rig in there and test it out?
- A. That is altogether something I have not thought of.
- Q. Don't you have men out watching developments?
- A. No, sir.
- Q. Some of the large companies do, don't they?
- A. They may. We don't.

Testimony of Gus Heard.

GUS HEARD, called in behalf of plaintiff, sworn, testified as follows:

Direct examination by Mr. BEAL:

- Q. Where do you live?
- A. Pittsburgh.
- Q. Are you connected with the oil and gas business?
- A. Yes, sir.
- Q. With what company?
- A. The Natural Gas Company of West Virginia and the Unity Oil Company.
- Q. How long have you been connected with the oil and gas business?
- A. This if the 23rd year.
- Q. What fields does your experience embrace?
- A. Pennsylvania, West Virginia and Ohio.
- 302 Q. Do you know of the Illinois Oil fields?
- A. Only by published reports.
- Q. Do you have a knowledge of the general form and character of the leases that have been and are in use for the purpose of developing and boring for oil and gas purposes?
- A. Yes, sir; I think I have a pretty fair knowledge of that.
- Q. I wish you would state whether now, and for some years past it has been practically universal to use a lease containing provisions whereby the land owner receives an annaul rental, and also, upon his part, has the right, upon compliance with the terms and provisions of the lease, to surrender the lease and determine any further liability thereunder?
- A. That's the form of lease in general use.
- Q. It has been in use for a great many years?

A. Yes, sir.

Q. Will you tell us the reasons, if any, arising out of the nature and character of the business, that makes the use of that form of lease and the presence of that surrender clause a proper and necessary one in the conduct of the business?

A. Well, when the idea got into the mind of the oil and gas operators that oil and gas existed over large areas of country—not confined to one county or state—but that it is possible to get it in widely separated regions, then the operators found it necessary to lease large patches of land, or it was to their interest to do it. They couldn't afford to lease just one farm and put a test well down on it, therefore they leased a large amount of land, so as to reap the benefit of a discovery, if one were made, and in order to make themselves safe and a decent business proposition to lease that amount of land, they make such arrangements as enables them to surrender the lease if they do not wish to pursue the operation any further.

Q. Is the prosecution of the search for oil one that involves risk and expense?

A. Very great risk and expense.

Q. Can you give us any idea of the extent and character of that? To what extent in the prosecution of the search for oil and gas are unproductive wells drilled which are a total loss?

A. There are no reliable statistics on that point; but the chances are almost all against a man finding anything away out in the open.

303 Q. After you have found the existence of oil in some new district or a district somewhat removed from prior pools, what is the fact as to whether the development of that particular field involves much risk and expense.

A. It always involves much risk and expense, because you may have a large amount of land leased near where the discovery has been made and you think it is pretty sure and you are induced to go on with that land and drill test wells, yet you fail.

Q. Is that a frequent occurrence?

A. Very.

Q. Is the drilling of dry holes something that happens frequently in the development of oil properties?

A. A common and every day occurrence.

Q. I judge from the testimony this morning, that it is quite clear that this present method of conducting the business, so far as affecting the leasing of oil property, is an evolution from past experiences. I want to ask you what has been the result of the adoption of this plan whereby you pay a rental and what has been the effect of that upon the land owners as regards their attitude?

A. About twenty years ago and up to that time—well, say from '80 to '85, or from '79 to '83, leasing was going on in the Counties of Webster Pennsylvania very extensively—Westmoreland, Washington and Greene. Leases at that time contained an express agreement to pay rentals for delay in operation, and some leases have had a clause in which, if the rentals were not paid, the lease would become null and void. The theory if the people having leases was that that was voidable at their option, but there was a suit brought

in Westmoreland County on that and it was held that the lessee was bound to pay the rent. That so frightened oil operators that there was a wholesale surrender; some wouldn't accept and then it was compromised; but the effect was that there was a wholesale surrender of land. Then there was a consultation amongst attorneys here in Pittsburgh and a lease was drawn—what we call a provisional lease—which starts out as an ordinary lease, yielding $\frac{1}{8}$ of oil and so much a year for gas, and it says, "Provided that this lease shall become null and void unless a well shall be drilled within a certain length of time or unless a certain amount of money be paid for each three months that the completion of the well is delayed."

304 Q. That is the theory of the oil business to-day. It becomes null and void for the nonpayment of the lease?

A. There is a disposition in the minds of some to think that the Courts might hold that not to be good and they are inserting a clause where the land-owner expressly agrees, for a consideration, to take the lease back; but the option must be in the hands of the man who takes the lease to determine how long that lease shall exist, otherwise the business will cease.

Q. I wish you would state whether that form of lease whereby an annual rental is paid, coupled with the surrender clause, is advantageous to the owner?

A. Extremely so.

Q. Why?

A. For this reason: Without that provision these operators and speculators will not lease the land. They will not put themselves in a position where they are bound to pay a rental for delay in operation on large batches of land which have been condemned. They may, indeed, surrender leases, under these conditions, which are good, but they will hang on much longer than they otherwise would. If they haven't got the option, they won't go in at all.

Q. Has the effect of the use of this form been to create a more harmonious relation between the operators and the land owners?

A. It has had that effect. The land owners all through the region where I operate perfectly understand and consider it to be the law that the holder can surrender the least at any time, therefore he is willing to create conditions that will induce them to pay the rent as long as possible. The situation is, in Pennsylvania, Ohio and West Virginia there are millions of acres on which \$1.00 is paid for delay in operation, which would not be held a moment if the law were changed. It is to the advantage of the land owner to create that condition—that is, to induce speculators and operators to carry on one of the most risky businesses that I know anything about. It is a more risky business than mining for gold.

Cross-examination by Mr. HINDMAN:

Q. From your knowledge of the oil business, and experience, you say that unless there are some means by which the operator
305 would reserve the right to terminate the contract, he wouldn't take up large blocks of leases?

A. No, sir.

Q. Then if an operator, in good faith, were to go into wildcat territory he would not take a lease unless he were to acquire a large body of land?

A. The prudent speculator or operator would not do it unless he got a large body.

Q. And if it were in purely wildcat territory, in order to induce him to take up that block of land, the rental must necessarily be nominal?

A. It ought to be. It is not always so.

Q. Is it true that large land rentals are paid on purely wildcat territory?

A. Yes; 25c. and 50c. an acre on wildcat stuff,—purely so.

Q. And the person taking leases at that rental would naturally, in order for self protection, if he intended to make developments, must secure a large body of leases in that vicinity, so if he should make a development he would get the benefit of his exploration?

A. Yes, sir; any man would do that.

Q. No prudent oil man would go into wildcat territory and take up a small patch of land—say 50 or 100 acres?

A. No.

Q. You would consider that anybody to do that would be a visionary adventurer, without any good faith in him at all, simply expecting to turn it over for somebody else?

A. It is true for obvious reasons.

Q. If a party would go into a wildcat region and take up just a small tract of land, it would be with the expectation of not making a development, but of holding it with a view of somebody else developing it?

A. I couldn't know what would be in a man's mind to do that. We have no more of that kind.

Q. You wouldn't expect a man to do that?

A. No, sir.

Q. Especially when he could get land for 25c. an acre?

A. Well, a prudent man,—if he couldn't get the land on some terms he wouldn't take it at all.

Q. What would you say of a party who would take up fifty acres at 25c. an acre in wildcat territory? Would you say that was in good faith, expecting to make a development?

A. It would depend on the extent of the speculative mind in that region. If there was a high tide of speculation going on and the theory had grown in their minds that it would be an extensive oil land, he might do it.

Q. A prudent man wouldn't put a well on a fifty acre block in wildcat territory?

A. I wouldn't want to, unless there was a well away on ahead or on this side or that side.

Q. Then it is not essential that he should have a large block? It depends on conditions?

A. Yes, sir.

Q. A prudent man would go in and take up a twenty acre tract, wouldn't he, in wildcat territory?

A. He might consider himself prudent. That's a relative term.

Q. What would you consider it?

A. I would have to see the ground.

Q. Could you tell by looking over the ground whether there was any oil there or not?

A. I would get some impression.

Q. Would it be shown by the character of the ground—the surface?

A. No; it wouldn't show on the surface.

Q. What would?

A. I would hunt around to see if I could not find some well drilled ahead and see how persistent the production was on the land back of it. If the production in the land approaching this position had been sustained, I might jump out a long distance ahead. But every well you drill in the ground partakes of the nature of a wildcat well.

Q. If you were to narrow it down and control it by surrounding development, where does the boundary between wildcat and developed territory begin?

A. It is a very shadowy one.

307 *Testimony Taken and Proceedings Had Before the Honorable Walter T. Gunn, Master in Chancery Aforesaid, at the United States Circuit Courtroom, Danville, Illinois, on Tuesday August 17, 1909.*

Appearances: Counsel present same as before.

Testimony of F. H. Sinclair.

Mr. FRED H. SINCLAIR, a witness called on behalf of defendant, being first duly sworn, was examined in chief by Mr. Lowe, and testified as follows:

Q. What is your name?

A. Fred H. Sinclair.

Q. Are you the same Fred H. Sinclair who testified at another time in this case?

A. Yes sir.

Q. What is your occupation at the present time?

A. Cashier of the State Bank of Martinsville.

Q. Have you in your possession the book of original entries of the account of James A. Smith and Susannah Smith?

A. Yes, sir.

Q. Of money deposited by E. N. Gillespie?

A. Yes, sir.

Q. You may produce that book.

(Witness produces book.)

Q. You say this is a book of original entry?

A. Yes, sir.

Q. You may state the one you have there as to the number of payment, that is, as to whether second, third or last?

A. This is the first.

Q. What have you now,—whose account?

A. Well, I have the account of James A. Smith.

Q. What is the amount shown to his credit, if any?

A. \$5.

Q. Who left that money?

A. Left by E. N. Gillespie.

Q. For whom?

A. The credit of James A. Smith.

Q. And was it placed to his credit?

A. Yes, sir.

308 By whom?

A. By me.

Q. Have you any other account there with any of the defendants anywhere?

A. I have the account of Susannah Smith.

Q. What is the amount of that money?

A. \$22.50.

Q. By whom was that left?

A. E. N. Gillespie.

Q. For whom?

A. For the credit of Susannah Smith.

Q. By whom was that credit made there?

A. By me.

Q. What was that money left for?

A. To pay the rental on certain oil and gas leases.

Q. Susannah Smith?

A. Susannah Smith.

Q. Given by her to whom?

A. E. N. Gillespie.

Q. Was it given to E. N. Gillespie or assigned to him? Do you know about that?

A. Well, no, I couldn't say as to that.

Q. And what was the James A. Smith deposit made for?

A. For the same purpose, to pay rental on a certain oil and gas lease.

Q. Given by whom?

A. Given by James A. Smith.

Q. And who owned the lease at that time, at the time the deposit was made?

Mr. HINDMAN: Unless he knows; I don't suppose that he knows.

A. Well, I don't believe I can state. We supposed, of course, it belonged to Gillespie.

Mr. HINDMAN: Well, we don't want any supposition.

Mr. LOWE: We now offer these two account in evidence, gentlemen—a book of original entry.

(A copy of which said Exhibits are as follows:)

309 *Copy of Exhibits—A Book of Original Entry.*

Exchange Bank, Martinsville.

See No. —.

James A. Smith

Date.	Checks.	Deposits.	Dr. balance.	Cr. balance.
1906, Apr. 7..	5.00	5.00

Susannah Smith

1906, Apr. 7..	22.50	22.50
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Mr. LOWE: You may ask him.

Cross-examination by Mr. HINDMAN:

Q. You are the same Sinclair who testified at the former hearing in this court?

A. Yes, sir.

Q. The same Sinclair who brought a copy of this entry, or an alleged copy of this entry instead of the original?

A. Yes, sir.

Q. Your reason for not bringing the original, as you gave before was that the book was too heavy to bring here?

A. Well, yes, I think that was the reason I gave, and then I didn't understand quite that it was necessary; didn't understand really that I was expected to bring the book.

Q. Yes. The book weighs about how much?

Mr. LOWE: Now, to that I object, your Honor.

A. I could make a guess at it.

The MASTER: I don't see that that is material.

Mr. HINDMAN: It will be later.

The MASTER: All right.

Exception by complainants.

A. Oh, I would say about eight pounds.

Q. You had no difficulty in getting the original book here at this time, did you?

A. Well, no, not a great deal; a little bit unhandy.

Q. Of what bank is this a record?

A. The Exchange Bank, Martinsville, Illinois.

Q. Is the Exchange Bank in business now?

A. No, not under that name.

Q. Is that record in use in any Bank now?

A. Well, I wouldn't consider it so, except that as I explained before the Martinsville State Bank when it was organized took on the business of the Exchange Bank. It was reorganized and made the Martinsville State Bank.

310 Q. This book, however, is not in use now in the Bank only as an accident record; it is not in active daily use now?

A. No, only as a reference book. Of course, it is not a current ledger. In case we go back far enough to make a statement for some one on there we might have to go back that far.

Q. What relation did you sustain to the Exchange Bank of Martinsville on April 7, 1906?

A. I was acting as assistant cashier.

Q. Who was the cashier proper?

A. H. Gassaway.

Q. Who was the cashier proper?

A. H. Gassaway.

Q. Is this the only book or record in which you made any entry of this alleged transaction?

A. The deposit ticket, you wouldn't call that a book, though; we tie them up in bundles after *this* posted. Now, we have a kind of an intermediate book, don't really call it a book, it is where we enter, say, the depositor's name and the check as a matter of verification for part of our teller's cash work book; but this it the only book, that we consider the original book of entry as being posted from the checks and deposits; you might call the other a blotter, or intermediate book.

Q. You have no other ledger or no other book, except this book?

A. No, sir, this is the only one; this is the only one.

Q. You had no journal in the bank?

A. Well, you might—we call the intermediate book a journal; some calls it a blotter, and some a journal. I can explain how we carried that. Now, the deposits were assembled alphabetically before we put in this loose-leaf system of assembling them, sometimes carrying the amount, and the deposits, of course, were entered on this side and all the checks on that side (indicating); they were added up as a matter of convenience to prove the bookkeeping work, or the teller's cash-book work of the day, and then carried—the amounts were carried off of that into this book. This is the original ledger; this is the only ledger that we had.

Q. Did this bank continue in business after April 7th?

A. The Exchange Bank?

Q. Yes.

A. Yes, sir; under the name of the "Exchange Bank" it continued in business.

Q. After what date?

311 A. At the close of business on July 15, 1906.

Q. Then the business was taken over by the new organization?

A. Yes, sir; called the "Martinsville State Bank."

Q. You ceased then to be assistant cashier and became cashier proper of the new organization?

A. Yes, sir; that is correct.

Q. The entry which has been copied by the stenographer is the last entry on this page, isn't it?

A. Yes, sir.

Q. There are other entries above it on that page?

A. Yes, sir; I can explain that.

Q. Yes; explain what?

A. I say I can explain. You see there are four accounts on the page. You will find it that way quite a good deal, all the way through the book. Now, the two accounts there that you will find above the Smiths, when the money was deposited for the Smiths, these two accounts were both even, as you will notice by comparing the dates. Well, when an account is closed we have no assurance that a customer will be back, and so we place others on the same page, not expecting them probably to be back. And one you notice has never come back, the Smith above here (indicating) and the other over there (indicating) came back and made another entry. Now, that balance, I believe, it shows \$250 and something, was then carried on into the new book when the State Bank—there are several to a page. That is my explanation of that.

Q. At the top of the page the name of the person's whose account is being carried on that page is—

A. Sarah A. Swallen, I think.

Q. Sarah A. Swallen. The account—her account began on December 21, 1905, and the last account, the last item of that account is May 10th, 1906, is it not?

A. I think so.

Q. Immediately under that you have an entry of James A. Smith, April 7th, haven't you?

A. Yes, sir. But that entry of James A. Smith was made after the above account was even. You will notice that.

Q. Also on the same page above the Susannah Smith account is the account of Barney Smith. That is true, isn't it?

A. Yes, sir. His account at that time you will find was even, or closed.

Q. The last entry was January 27, 1906, of that account, wasn't it?

312 A. Yes, sir; whatever it shows.

Q. Immediately under that *up opened* the account of Susannah Smith dated April 7th, that is true, isn't it?

A. That is correct.

Q. How did it come that you made the James A. Smith and the Susannah Smith account on a sheet upon which you were carrying other people's account?

A. Well, we supposed these accounts would be closed; didn't know that the persons would be back; and it was our custom, as you will find by looking through the book there, instead of taking a new sheet, we would place, maybe three or four, on the same sheet, giving each one, maybe, a quarter of a page, or maybe more, maybe half a page; you will find others back farther, if you will just turn through the book, you will find that was our general custom. I could not tell just how we got into that, unless it was to save putting in new sheets or taking up space.

Q. Well, now, explain how this record of April 7th comes immediately under an entry of May 10th.

A. I thought I just explained that by——

Q. You say you have explained that?

A. Yes, sir; that was this way——

Q. Can you explain——?

Mr. LOWE: Wait, Mr. Hindman.

Mr. HINDMAN: Well, he said he explained it. If you have explained it, that is sufficient.

Mr. LOWE: Is there anything else you want to say?

The WITNESS: I thought I did. I would like to just mention——

Mr. LOWE: Go ahead.

The WITNESS: That at the time the James A. Smith entry was made there the account just above it was even. We did not expect at she would be back later. That was a matter of speculation. We figured likely that her account was closed, and didn't know at she would ever be back, or not, but she came in afterward, long in May, or whatever it shows there, and then made a deposit, and then, of course, it was placed right there. And then when the new bank was started, that balance as shown there was credited and started in the new book.

Q. Then the entry of May 10th in the Swallen account was made after the April 7th account?

A. Yes, sir.

Q. Can you explain why the ink in the April 7th is much brighter and fresher and newer than that which purports to be May 10th?

Mr. LOWE: Now, we object to that, your Honor; there is nothing to show that it is.

A. I can't catch with my eye that it is; I couldn't explain it if it is. I am not expert enough to state, to state whether it is plainer or not.

Mr. LOWE: Now we object to the question, your Honor. There has been no ruling.

The MASTER: Well, he can answer.

Exception by complainants.

Q. I will ask that you examine that page upon which appears the alleged account of James A. Smith and of Susannah Smith and state to the Master if it is not true that the ink in the entry of April 7th of the Smith account is not heavier and newer and fresher in appearance than the entry just above it, dated May 10th?

Mr. LOWE: Now, to that we object, your Honor.

The MASTER: Well, he can answer that question, if he wants to. Exception by complainants.

A. Well, I can't see any difference myself.

Mr. HINDMAN: I will ask that the Master inspect the record for himself.

The MASTER: Very well, I will do that.

Q. You can't see any difference?

A. No, sir. I mean to say that I cannot detect any difference; maybe my eyes are bad.

Q. Would you like to borrow a pair of glasses?

A. No, I don't use glasses.

Q. Then your eyes are not bad, are they?

A. Well, I said they might be; there might be something wrong with my sight. I am not an expert.

Q. Well, you wouldn't be in a bank this number of years and not discover that fact, if there should be such a defect, would you?

A. Well, I shouldn't think so.

Q. Have you changed your system of keeping the accounts in the Bank that is now being conducted by you?

A. No, sir; we use very much the same system of placing them on the——

Q. Just the same?

A. Well, I would say, yes.

Q. Is the only entry you make when money is deposited
314 in the bank the deposit slip and the individual ledger, such as you have identified?

A. That is the only ledger we use. We use the intermediate blotter, some might call it a Journal.

Q. Don't you keep a journal, giving the daily transactions of the bank each day?

A. Well, what kind of transactions? You might make that a little plainer.

Q. All transactions of checks that come in, money deposited, money paid out?

A. Oh, yes, we call that our teller's cash book.

Q. Have you any reason for not bring- that?

A. Teller's cashbook? No, sir; I didn't suppose it was necessary. I just brought what I was instructed to bring. I have no objections whatever——

Q. Have you that daily journal in the bank now of which you are cashier?

A. Yes, sir; there are several of them; I suppose there would be——

Q. Have you the one that you was using on this date, April 7th?

A. Yes sir.

Q. Why didn't you bring it?

A. Well, I was not instructed—I did not understand that it was necessary to bring it; this ledger was all I understood, book of original entries. We don't really consider that a book of original entry. Some banks, I guess, don't use any journal at all——

Q. It was the book upon which you entered the transaction at the time it was made, wasn't it?

A. Yes, sir. It was a list, you might say, a list of the deposits of that day's business, and of course——

Q. Yes. And if this was taken from the entry, it was done after the close of the day's business, wasn't it?

A. This book was either posted on that—Now, if we were rushed,

busy, we might not get our books posted in the evening; I wouldn't want to state whether it was done that evening or in the morning.

Q. So if this book was posted from the other book it was after the close of business, or possibly the following day?

A. Yes, sir; yes, sir; that is correct.

Q. The other book would show all the transactions on that day—

A. Well, it would just be one line like this now (indicating). Now, here is our deposit balance, and it was say, "James A. Smith," it would say, "James A. Smith," and out in the column here, "\$5.00," and then as we would go over that blotter to check them up, we would check it off and we would show it was a credit here, and place it—

Q. In that book there would be no space between the transaction, I mean no vacant line?

A. No, no vacant line.

Q. If some other person had transacted business just before this business, it would be on the line above, bearing that date, wouldn't it?

A. Yes, sir.

Q. If someone else had transacted business, either deposited money or drawn out money that day from the bank after this transaction, it would appear on the line below, wouldn't it?

A. Well, I don't quite get your point. That is, maybe, you don't understand exactly what I mean by that journal. Now, after the day's business is over, we have what is called the Teller's Cashbook, if you will allow me to just explain a little, and we start in there with our daily cash, and then up here on the left side is the deposit; someone makes a deposit, suppose a man comes in and makes a deposit; we put that deposit ticket on a hook; then every once in a while, through the day, in order to keep the work up, we take these deposit slips off the hook and take them over to what we call the Teller's Cashbook; there they are entered in columns on the Teller's Cashbook, on the left hand side, as "Cash Received." They are just entered there, just the bare amounts are entered there. And so when we get through with the day's business the deposits are added up, and it shows so much deposits, the total deposit; then these deposit tickets are assembled, spread out on a table, as you will understand, and arranged alphabetically. We list those on the blotter, or what you might call a Journal. We list those deposit tickets along the blotter, or what you might call the Journal. Of course, then you would see on the Journal it would not be necessarily that the one that was made first would appear first; they are arranged alphabetically.

Q. Have you no record, no record of the original entry upon which you enter the name of the persons making the deposit?

A. Well, not except the deposit ticket and the blotter, what you would call the Journal.

Q. Yes, that Journal. That Journal would contain the names?

A. It would have the names; that is, we put the name on there

after the deposits are assembled in alphabetical order, that is, they would all be on there alphabetical-y arranged.

Q. And in making up that Journal of that day's business, you would not leave any blank lines, would you?

A. No, I think not.

Q. Is there any system of bank examining in this State?

A. I think so.

Q. Is that bank a state bank or national bank?

A. State bank.

Q. And the bank was examined at regular intervals?

A. Yes, sir.

Q. By the State Bank Examiner?

A. Yes, sir.

Q. And the only system of bookkeeping is the system you have described here?

A. Yes, sir; we have, outside of that, what we call a general Ledger of the whole business. It is a system that formerly was used by National Banks, I have been told; and on that there is a page for each day, and that is the book where we keep accounts with our correspondents, and our notes, and our——

Q. Then you did have, in addition to this blotter that you speak of, your had another Ledger, didn't you, aside from this individual Ledger that you have brought here?

A. What is called the General Ledger.

Q. I don't care what you call it; it was another Ledger?

A. Yes, sir.

Q. Upon which the entry of this transaction was made?

A. Well, no, that transaction would not appear on that book.

Q. Why not?

A. That just shows the total of deposits. It has one account where it says "Individual Deposits," and here is "so much per day," and what was deposited today is added to that, and over here in this column the checks are placed, the total amount checked, and they are taken from the total of the deposits, after which the deposits are added to it, carried over here, giving the total deposits at the close of the business.

Q. Then that we may fully understand this system of book-
keeping which obtained in the bank at that time, I will ask
317 you if this is true, that the only record, entry, made in that
book of the transaction at that time where a deposit was
made was simply the deposit-slip, the Blotter, or——

A. Journal, if you want to call it, some call it that.

Q. As you term it, and this Individual ledger?

A. Yes, sir.

Q. Don't you keep a daily collection register in the bank and didn't you at that time?

A. A daily Collection Register?

Q. Yes.

A. Of what kind of collections?

Q. Where you receive checks on banks other than yours?

A. We call that——

Q. Foreign banks?

A. We call that a Remittance Register.

Q. Well, call it a Remittance Register. Did you have such a thing in the bank at that time?

A. Yes, we had—

Q. What was the purpose of that book?

A. Well, that was—in that book we kept track of the letters remitting—of foreign collections that we sent out. We simply kept a carbon copy of that by which in case the letter would get lost, we could go back to that—we would know from whom the check was received, the bank it was on, and the last endorsement and Number, and so on—the amount.

Q. Then this money, I understand, was deposited in your bank through a check on a foreign bank, wasn't it?

A. I think that was correct.

Q. Yes. If that is true, you would have entered—made an entry on that record kept for that purpose, wouldn't you?

A. Yes, sir.

Q. Did you do that?

A. Well, I couldn't state exactly, because I did not have charge of that Register at the time, but I would take it for granted it was.

Q. You have that record, have you, now in the Bank?

A. Yes, sir; I think it is.

Q. You have not destroyed it?

A. Oh, no. The Cashier at that time wrote out the remittances—

Q. And if now on the 7th day of April, E. N. Gillespie deposited this amount of money by virtue of a check on a foreign bank you have a record which would show that fact, haven't you?—now in your custody?

318 A. As was explained when Judge Gasaway was up here you remember—

Q. Now, answer the question; you either have or have not.

A. Well, we have a record. If it was deposited on that day, if the check was there on that day—

Q. Why didn't you bring that record here?

A. Well, I didn't suppose it was necessary; I was not instructed to bring it.

Q. Why, that was a record of this transaction, wasn't it??

A. Well—

Mr. TROUP: Well, now, we object to that, if the court please. This witness would not bring anything but what he was told to bring.

Q. Were you told to not bring these other records?

A. No, sir; I was told to bring the original entry that had the account of James A. Smith, as I understood it, and this is the original entry.

Q. Were you told not to bring the other record?

A. No, sir.

Q. I will ask you if it is not true that if this transaction ever occurred you would make these records, first, a deposit slip?

A. Yes, sir.

Q. You would also have a cash balance record?

A. Yes, sir.

Q. Did you have?

A. Yes, sir.

Q. Have you it still?

A. Yes, sir.

Q. You would have your daily journal or blotter as you term it, upon which you would enter the different transactions of that day?

A. Yes, sir.

Q. You did have it?

A. Yes, sir.

Q. And have it still?

A. Yes, sir.

Q. You would have your collection register upon which would appear the record of all the foreign collections?

A. Yes, sir.

Q. You did have it?

A. Yes, sir.

Q. Have it still?

319 A. Yes, sir.

Q. Of that date?

A. Yes, sir.

Q. Upon all of these records and papers would appear this transaction, wouldn't it?

A. Yes, sir; it should.

Q. Showing the data and detail of the entire transaction?

A. Yes, sir.

Q. You have no reason to conceal any of the evidence in relation to this transaction, have you?

A. None whatever.

Q. Do you remember after you testified here before in this case about the record you had your attention called to this transaction, and you said the only record was the individual ledger?

A. Well, that is the only record that I consider of original entry as far as deposits are concerned.

Q. But it is not the original entry at all, is it?

Q. Well, I don't know how you would determine that; that is how we considered it. We consider that the original entry as far as our ledger was concerned.

Q. I will ask you if it is a fact that these other records that I have mentioned are not made before the individual ledger is made up?

A. Yes, sir.

Q. Then instead of being the original entry it is the one most remote?

A. Well, you might term it that way.

Q. Now, you know Mr. Solley, do you not?

A. Well, yes.

Q. Do you remember the next day after you testified of a couple of gentlemen calling at your bank?

A. Yes, sir.

Q. In Martinsville, and asked to see the record of this transaction?

A. Yes, sir.

Q. And you refused?

A. Yes.

Q. Now, when money is left in your bank for different persons, I think you testified before, that it — the practice and rule and custom of the Bank to notify the persons to whose credit the money has been placed by postal card, or otherwise?

A. I think that is correct.

320 Q. And in this particular instance you did notify Susannah Smith and James A. Smith, did you not, by postal card, when the money was left there?

A. Well, I could not state that it was always done; we usually did it; sometimes it may have been forgotten. Now, I didn't attend to that business at the time. Just Judge Gasaway as a rule attended to that and I could not state whether he notified them every time or not but that was our intention. I might have been overlooked some time.

Q. That was the custom of the bank and has been for a long time and a rule of the bank?

A. Yes, sir; that was the custom.

Q. You followed that rule and custom when these deposits were made to James A. and Susannah Smith, did you not?

A. Yes, that was the custom to the best of my recollection.

Q. I will hand you a bunch of cards and ask you if these are the cards you sent to James A. and Susannah Smith, at the time these deposits were made (handing cards to witness)?

A. These are the cards that were sent them, I would judge, but of course if is not my handwriting. Mr. Sharp attended to this part of the work.

Q. Mr. Sharp was an employe there in the bank?

A. Yes, he was assistant cashier.

Q. Yes; you recognize that as his handwriting?

A. Yes.

Q. That is your name at the bottom of the card there as cashier?

A. Yes, sir.

Q. How many of those cards are there?

A. In here? Eight.

Q. Eight. Did you on April 7th send either James A. Smith or Susannah Smith a card notifying them that the money had been left there to their credit?

A. I cannot remember.

Q. If any money had in fact been left there to their credit at that time you would have sent them such a card, wouldn't you?

A. Well, I was not in charge of that part of the work at that time.

Q. You know your method of doing business in the bank?

A. Yes, sir; it should have been done.

Q. Should have been done?

A. Yes, sir; that was our custom.

321 Q. Examine these cards, please, and tell us the date of the first one, the earliest date?

A. The earliest date on any of them that I find is May 13th 1907.

Q. May 13th, 1907. Have you any record of any payment having been made or deposit having been made in that bank for James A. Smith or Susannah Smith aside from this April 7th prior to the date of that card?

A. You mean—we haven't any card. We have records, as described before.

Q. Can you explain why there were no notices sent prior to the date of that card?

A. No, sir, I could not explain that.

Mr. LOWE: Now, your Honor, I object to that, because he went over that in the other examination, and the witness testified and the court will remember, of them not sending these notices because they did not know where these parties got their mail and as soon as they got their addresses they sent these cards out and I object to him going over it again.

Mr. HINDMAN: Well, I will straighten him out.

Q. Is it true that you did not know the addresses of James

A. and Susannah Smith up until 1907?

A. Well, I could not state how soon we found it out. I understood from Judge Gasaway that the reason he did not mail the notices was he did not know their postoffice address.

Q. He did not know their postoffice address?

A. I don't know just when he found it out.

Q. Examine this paper marked Defendants' Exhibit 9 (handing paper to witness) and state whether or not that is Judge Gasaway's handwriting.

A. Well, I would say that was Judge Gasaway's signature as well as I know it.

Q. Did you know that Judge Gasaway had written to James

A. Smith a short time prior to April 7, 1906?

A. No, sir; I do not.

Q. You know that he did, don't you?

A. Well, I guess—I would say yes; at least, that is his signature there—

Q. Then your failure to send the card was not because you did not know his address, was it?

A. Well, it would not seem so there.

322 Q. Yes. Furthermore when this deposit was made you have testified that E. N. Gillespie was present in the Bank and delivered the check personally, isn't that true?

A. I don't remember whether I stated that—

Q. Have you so testified?

A. I don't remember.

Q. What do you say about it now?

A. It is my best recollection that he was there; a short time before that—

Q. If then at that time you received a check from Mr. Gillespie in person to be placed to the credit of James A. Smith and Susanah Smith, and it was the custom of your bank to notify persons when money was left to their credit, why didn't you learn from Gillespie where these persons lived so that you could send them the customary notice?

Mr. LOWE: To that we object, your Honor,—argumentative, arguing with the witness?

The MASTER: Well, he may answer.

Exception by complainants.

A. I was not in charge of that part of the work at the time. About the only way I can explain it, Judge Gasaway was looking after all such business as that and I couldn't state why he didn't find it out.

Q. And you can't state why you didn't find it out?

A. No, sir; I can't state because I was not giving the matter the attention at the time.

Q. Can you explain to the Master why you refused to allow Mr. Solley to look over the records in your bank in relation to this transaction?

A. Well, it is not our custom. Of course, when a man comes in there and wants to examine our books it is not our custom to permit people to do that, unless it is something—unless they have orders to that effect. We are not in the habit of showing people our depositors' accounts and the other reason was that I considered it of the reason; and the other reason was that I considered they had the original ledger sheet up here and I could produce that, of course.

Q. No, but you had the collection register and the cash balance register and the daily journal of that bank at that time, hadn't you?

A. Yes, sir.

Q. And you refused to allow them to see those records didn't you?

323 A. Well, I refused to show him the account, that is, because we didn't have the original account. I never thought about these other books. In fact, I don't know that he asked to examine these books. I couldn't refuse him if he didn't ask to examine them, and it is not our custom, of course, to let people examine accounts. That is all the explanation I can make of that.

Q. Now, when a transaction occurs, say, on the 17th day of April, 1906, you would make an entry on your book to correspond with the day on which the transaction occurred?

A. Well, there might be an exception to that rule as I explained when I was here before. One of the deposit tickets, you will notice, there was a day, possibly two days difference between them and the entry you found on the ledger from the fact that on the Saturday after we might close our books the account was entered up on the

ticket; it would not get posted to the ledger until the next Monday and go in for Monday's business; once in a while it happened that way.

Q. Was April 7th that way?

A. Well, I would have to figure up and see.

Q. So that if it turns out that this occurrence was not in fact, on April 7th, would you have any way of explaining the presence of this entry bearing that date?

A. Yes, sir.

Q. You would not?

A. Yes, sir.

Q. Then your records in that bank don't mean anything, do they?

A. Well, we think they do.

Q. Yes. Then what is the purpose of keeping a record of the time?

A. Well, to show the transaction in full—

Q. Yes, and when it occurred, too?

A. Yes, sir; and when it was.

Q. Did this thing occur on April 7th, 1906, this deposit?

A. That deposit—

Q. Take your book that you depend on for that purpose and tell the court whether or not that transaction occurred on April 7th, 1907, if that is what you keep the records for.

A. Well, according to the system it might have occurred on the evening of the 6th; and it was put on the books for Monday's business. It frequently happens that way.

Q. The evening of the 6th? That would be on Sunday, Monday's business was the 7th.

324 A. Well, it wouldn't have occurred on Sunday.

Q. No, certainly not. So you mean to be understood as saying you cannot tell, from an examination of your record on what date that transaction actually occurred; is that right?

A. Well, I could examine it if I had the deposit ticket and—

Q. Well, but from this record you have here can you tell what that occurred?

A. I could not tell the exact date just from this record, no.

Q. Why didn't you bring the necessary record so that you could testify just as to when this transaction occurred?

A. Well, as I stated a while ago this is the book I understood was to bring, and I brought up what I thought I was instructed to bring. They are all down there; we have got every one of them.

Q. I will ask you if it is not true that you testified before that this was the only book that contained a record of this transaction?

A. I think I did.

Q. Yes.

A. That is, as I—

Q. Now, it transpires that there are three other books that contain the original entry?

A. Well, my theory all the time—I understood this to be the record of the original account. I may have been wrong in what you consider the original account.

Q. So you consider as a banker that a book removed at least three degrees from the original entry was a book of original entry?

Mr. LOWE: Well, I don't think that is material or proper, and I will object.

The MASTER: Oh, well, let him answer.

Exception by complainant.

Q. I am going back to Exhibit 9 and I will ask you if this portion which you have identified as being the writing of Judge Gasaway is not written at the bottom of the letter purporting to have been written by James A. Smith?

A. I would say yes; it would seem that way to me.

Q. Do you recognize the stamp of the Exchange Bank of Martinsville at the top of the communication by Judge Gasaway?

325 A. Well, that is either our stamp or one exactly like it. I would say that is our stamp or an exact copy of it. I could not say about a rubber stamp, there might be another one just like it.

Q. Now, you may read, if you will, the letter of Smith to which Judge Gasaway wrote the reply. Read it in evidence as a part of your cross-examination.

A. (Reading:) "3/16/06, Yale, Illinois, Box 30"—I think it is 30; there is a line there that might look like a "1"—130; I would say "Box 30, R. S. D. No. 1 Exchange Bank Martinsville, Illinois. Gentlemen. Do you have a lease of oil and gas given to"—I think that is M. A. Walton, it is not very plain. I will say "M. A. Walton by James A. Smith and Susannah Smith, given on the 22d"—I think it is; it is not very plain—"22d day of May, 1905, due the 22d day of February, 1906, and is there any money deposited there for us? If so, please let me know by return mail. "Yours, James Smith."

Q. Now, you may read the letter or reply which you say was in the handwriting of Judge Gasaway, which appears upon the bottom of that same sheet.

A. (Reading:) "Exchange Bank, Martinsville, Illinois, March 17, 1906. No such lease here, and no money deposited to your credit. Yours truly"—I believe it is—"H. Gasaway Cashier."

Q. And this man Gasaway was in fact Cashier of that bank at that time; is that true?

A. I didn't understand.

Q. This man Gasaway was in fact Cashier of that bank at that time? Is that true?

A. Yes, sir; he was cashier of that bank at that time.

Mr. HINDMAN: We now desire to introduce in evidence the defendant's Exhibits 2 to 8 as part of the cross-examination of this witness.

Mr. LOWE: We object, your Honor.

The MASTER: Well, do you object because there is a witness on the stand?

Mr. LOWE: Yes, this is cross-examination; this is not their case in chief?

Mr. HINDMAN: Certainly not; this is offered as part of the cross-examination. We now offer them in evidence.

The MASTER: As part of your case in chief?

Mr. HINDMAN: No, as part of the cross-examination of this witness.

326 Mr. LOWE: We object.

The MASTER: Well, it must be part of your case in chief; it shouldn't be part of their case.

Mr. HINDMAN: No, I know, but it is part of the cross-examination of their witness.

The MASTER: Well, they can go in following the cross-examination of this witness, but they will be considered as part of the evidence in chief of the defendant.

Mr. HINDMAN: I don't care how it is considered, but it does go in part of the cross-examination of this witness, and separate and apart from the cross-examination, it would be absolutely meaningless.

The MASTER: All right; they may go in.

Mr. HINDMAN: And the letter also, No. 9. We did introduce that a while ago.

Mr. LOWE: Now, I understand the court overrules the objection.

The MASTER: Oh, yes; you object on the ground it is not the proper place to put them in.

Mr. LOWE: Yes, and that it is not competent at all.

The MASTER: Well, they will be introduced as part of the defendants' evidence.

Exception by complainants.

(Copies of which said Exhibits are as follows:)

Redirect examination by Mr. LOWE:

Q. The letter introduced here that you read, written by James A. Smith to the bank, and by H. Gasaway to them, is all on one sheet of paper, is it not?

A. Yes, sir.

Q. And was sent out of the bank and away from the bank at the date it bears, written by Judge Gasaway?

A. Well, I could not state, because this is the first time I ever saw the letter in my life; I could not state as to that, because I do not know.

Q. It bears date "3/16/06" and the date by Mr. Gasaway marked "17/1906." This letter has not been in the care or control of the bank since that time.

A. No, I would say not.

Q. That is Defendants' Exhibit 9. Then you didn't have in the bank the address of these folks at any time—at the time the deposition was made?

327 A. Well, I couldn't say as to that; it might have been in there; Gasaway might have found out the address or had it in some place; I don't know.

Q. Did you know anything about the address at that time?

A. Not at that time.

Q. On March 16th or 17th or at the time Gillespie made the first deposit?

A. No, I didn't know anything about the address.

Q. If the defendants in this case would subpoena you to bring the deposit slip of this money deposited in the case in which you are testifying, your cash balance record and the daily journal or blotter, and the collection register, would you bring it into court for them?

A. Yes, sir.

Q. Have you been asked by them to bring it in?

A. No, sir.

Q. Have you been instructed by counsel or any of the complainants or any one for them to not bring them in?

A. No, sir; I have not.

Q. And you understood from all parties present at the other examination of witnesses in this case that this is what they wanted you to bring, is it not?

A. Yes, sir.

Mr. HINDMAN: Oh, we object; these are very leading questions, Judge.

Mr. LOWE: Well, it is in rebuttal of your cross-examination.

Mr. HINDMAN: It is not rebuttal of anything.

Q. In April 1906, what kind of a bank was the Exchange Bank?

A. You mean whether it was a private, State or National?

Q. That is what I mean exactly.

A. It was a private bank.

Q. And private banks, are they examined or not?

A. No, sir.

Q. Then at the time about which you are speaking, prior to July 1906, the Bank had never been examined at all, had it?

A. Never had been examined. It was not examined till in March, 1907.

Q. I will ask you, Mr. Sinclair, whether or not the credit of James A. Smith on the back introduced in evidence here, under date of April 7, 1906, was made before or after the credit to Sarah A. Swallen under May 10th, 1906,—Was that made before or after?

A. Made before.

328 Q. The James A. Smith credit was made before the Sarah

A. Swallen Credit on May 10th?

A. Yes, sir.

Q. I believe you testified that it was your custom in keeping these books to make some three or four entries on a page?

A. Yes, sir.

Q. Did you do that in other cases than in the James A. Smith and Susannah Smith cases?

A. Oh, yes; quite frequently.

Q. In this identical book?

A. Quite frequently; the book will show.

Mr. LOWE: Here it is gentlemen, in the book, if you want to look at it, case after case of it.

Mr. HINDMAN: Now, is Judge Lowe testifying or is the witness?

Q. When was it Mr. Solley and two other gentlemen called asking to see your books?

A. You mean the last,—this last time?

Q. Yes, I suppose. At the time Mr. Hindman referred to?

A. Well, I couldn't state the date; I don't remember. It was a few days after I came back from here, in June, I think. I don't remember the date.

Q. Who was there with Mr. Solley?

A. I don't remember the man's name. He introduced him to me but I couldn't remember him at all.

Q. Was there one or two gentlemen?

A. One. I think, that came in with him.

Q. You don't know whether this is the gentleman sitting here (indicating) was it he?

A. No, it was not that gentleman; That is this gentleman did not come in—

Q. This gentleman's name is Walter Hennig? Do you know him?

A. Yes, I know him.

Q. Was it he?

A. No.

Q. Now, was it Johnson?

A. No, sir.

Q. C. F. Johnson?

A. No.

Q. What did they say to you?

A. I don't remember all he said, but we went in a back room there, a private room, and they asked something in regard to
329 if we had the accounts or if he could examine the accounts, or if I could give him a list or something to that effect. I don't just remember the words. He wanted information in regard to the Smith account. I think he wanted a list of the entries as we had given them up here. Now, that is to the best of my recollection. But I told him that the original sheet and the ledger was up here and I could not very well give it to him; and I told him I was not sure it would be proper to do that anyhow; that this matter was in dispute and we did not want to get into any more trouble then we had already got into.

Q. If James A. Smith or Susannah Smith had *have* called at your bank to see their account after April 7, 1906, and before July 15, 1906, at the change of the two banks, what book would you have shown them?

A. I would have shown them this individual depositors' ledger.

Q. You may state whether or not in your judgment this is the original entry of the account of James A. Smith of the deposits made by E. N. Gillespie under date of April 7, 1906.

Mr. HINDMAN: Oh, we object to that.

The MASTER: Well, the book is in evidence and he stated in his judgment that that was the original book.

Mr. LOWE: That is all I want him to do, and if he has already done that—

The MASTER: Well, he said that.

Mr. LOWE: Well, if he said it, I don't want to get it again.

The MASTER: Well, he stated that several times.

Q. Do you have at any time, Mr. Sinclair, any desire or any assurance, or any intention of keeping James A. Smith or Susannah Smith from knowing the condition of their account in your bank?

A. No.

Q. The letter written by Judge Gasaway says "No such lease here and no money deposited to your credit." It does not state to whom it was written, or anything about it. But was there any money deposited to the credit of James A. Smith or Susannah Smith in your bank on that date, March 17, 1906?

A. No, sir.

Q. Then the letter did state the truth?

A. Yes, sir.

Q. Was the lease deposited there or left there?

A. I couldn't state as to that; I didn't have charge of looking after that.

Q. Did you know of any?

A. I didn't know of any; not to my knowledge.

Q. On April 7, 1906, was there \$22.50 on deposit in the Exchange Bank of Martinsville to the credit of Susannah Smith paid by E. N. Gillespie?

Mr. HINDMAN: We object to that.

The MASTER: Well, now, the facts embodied in that case have been answered.

Mr. LOWE: Well, if it was that is all we want.

The MASTER: There is a check in evidence signed by Gillespie on that date; it is in evidence. If they object to it on that ground, the objection will be sustained.

Mr. LOWE: What do you do, gentlemen?

Mr. HINDMAN: Well, we object to him encumbering the record.

The MASTER: I am quite positive that has been answered three or four times.

Exception by complainant.

Mr. LOWE: That is all.

Recross-examination by Mr. HINDMAN:

Q. Judge Lowe has asked you that if James A. Smith or Susannah Smith were to call at your Bank to see the records of their account you would show them this record that you have identified here today; is that right?

A. That is correct.

Q. You would not show them the other records kept in the bank, would you?

A. I would not consider it necessary.

Q. Oh, no. You would not show them the deposit slips, the cash balance register, the daily journal and the check collection register?

A. After I had showed them this if they doubted it and wanted

to go into detail and ask for more evidence of course I would show them everything I have, bring them around inside.

Q. Now, you have been asked also about your manner of making entries in your book here, whether you made an entry appear the day upon which the transaction occurred. I will ask you to examine this paper marked Complainant's Exhibit No. 11 (handing 331 paper to witness). This is a deposit slip, is it not?

A. Yes, sir; that is—

Q. Showing that on April 7, 1906, E. N. Gillespie deposited to the credit of James A. Smith \$5?

A. That shows there was a deposit made to the credit of James A. Smith—

Q. When?

A. On April 7th of money or check left by E. N. Gillespie. Now, that was explained by—

Q. Well, now—examine Exhibit 12 Complainant's Exhibit 12 (handing paper to witness) and state what that is.

A. Well, that is an original deposit ticket showing that on April 7, 1906, there was placed to the credit of Susannah Smith out of money or checks by E. N. Gillespie \$22.50.

Q. Now, that is the transaction which you claim occurred when Mr. Gillespie appeared in the bank and delivered the check in person?

A. No, I don't think I stated that; I did not intend to.

Q. Well, what do you say about that?

Mr. LOWE: Well, I didn't ask him anything about that, your Honor, and that was all gone over at the other examination.

A. This check was in the other examination and Judge Gasaway—

Mr. HINDMAN: Well I am cross-examining him.

Q. Examine this paper marked Exhibit 10, complainant's Exhibit 10 (handing paper to witness) and state whether or not that is the check you claim constituted a deposit of \$5 to James A. Smith and \$22.50 to Susannah Smith?

Mr. LOWE: I only object, and do object, because it has all been gone over before, every bit of it.

Mr. HINDMAN: It is for the purpose of fixing dates.

The MASTER: Well, he has testified to that, before.

Mr. LOWE: Yes, and the checks are in evidence now.

The MASTER: Yes.

Mr. HINDMAN: Yes, I know they are but I want to call his attention to the date for the purpose of determining whether these books are correct, or not?

The WITNESS: Well, I can explain that; I think it has been explained before.

Mr. LOWE: Yes, two or three times.

The WITNESS: This check—

Q. All I want is to call your attention to that check; that is the check, is it?

32 A. That is the check, as I understand it.

Q. What date does that check bear?

A. April 4th, 1906.

Q. Then why did you make your deposit slip and this book that you brought here appear April 7th?

A. Because the check was held a few days, as I have understood from Judge Gasaway until he found out where the post office address was. It was his custom sometimes to hold rental sometimes and it was not always placed to the credit of the parties on the day it was received. Now, that is the way I understand it; that is the only explanation I can offer.

Q. But in your collection register you keep a date of the record of the check for the purpose of identifying it, don't you?

A. In the collection register?

Q. Yes, sir.

A. Judge Gasaway had a custom——

Q. No, just answer my question. If you kept a collection register you kept a date of the check for the purpose of identifying the check, didn't you?

A. Yes, sir; the day we sent the check out to our correspondents, our collection register would show what date it was sent, but don't know what day we received it.

Q. You say this check was held from the 4th until the 7th for the purpose of ascertaining some address?

A. I say I understood Judge Gasaway to say that.

Q. Whose address?

A. The Smiths', James A. and Susannah.

Q. The Smiths' address. Now, then on April 7th when the entry was made you did have the Smiths' address, didn't you?

Mr. LOWE: No, he didn't say anything of that kind. Now, I object.

Q. Then what is the purpose of holding it?

A. I said that was part of the purpose, as I understood it and another part Judge Gasaway had a habit of—sometimes he would cash a check and put the money in the envelope and write on the envelope who it was for and then later place it to the credit. We did several of them that way; that is my understanding of it.

Q. And that is your explanation of the discrepancy between four and seven?

A. Yes, that is the way I understand.

Q. It was held until he could determine the address of the Smiths?

33 A. That is the way I understand it; I couldn't state myself.

Mr. HINDMAN: That is all.

Redirect examination by Mr. LOWE:

Q. Is that first endorsement there in red ink the endorsement of your bank?

A. Yes, sir; that is either it or an exact copy of it.

Q. Yes, sir. Well, does that give any date?

A. That gives no date.

Q. Would it not be possible for Mr. Gillespie to hold that from the 4th until the 7th before bringing that to your bank to deposit it?

A. Why, it could be. As I said a while ago I couldn't say what date he brought it in. Our endorsement stamp does not show what day.

Q. It has been asked if you would have shown them the deposit slip. Would you if he had come to see it—James A. Smith and ask?

A. Certainly we would have shown it.

Q. The cash balance register; would you have shown that?

A. Yes, sir.

Q. Would you have shown the journal or cash register?

A. Yes, sir.

Q. I want to ask you, Mr. Sinclair, have you any desire in any way, shape or form, to keep any information about the deposits in this matter back, or tell anybody who has a right to know about it, all about it?

A. None whatever.

Q. Have you ever tried to keep anybody from knowing all about it who had a right to know about it?

A. No, sir; never have.

Mr. LOWE: That is all.

Mr. HINDMAN: Now, we desire to cross-examine Mr. Gillespie further before proceeding with our side of the case.

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Testimony of E. N. Gillespie.

Mr. E. N. GILLESPIE, being recalled was further cross-examined by Mr. Hindman, and testified as follows:

Q. Your name is E. N. Gillespie?

A. Yes.

Q. The same E. N. Gillespie who testified before in this case?

A. Yes.

Q. I believe, Mr. Gillespie you testified on your former examination that you in person delivered to the Exchange Bank at Martinsville this check marked Check No. 10. Is that correct?

A. Yes, sir; that is right.

Q. You wrote that check?

A. Yes, sir.

Q. You did all the writing on that check?

A. Yes, sir.

Q. It has been done with pen and ink?

A. The face of the check, yes sir.

Q. The part in writing, "April 4th," the figure "4" and the figure "6" written over the "190" make "1906" is that right?

A. "April 4th, 1906."

Q. Also in the bank which is printed at the beginning there, "pay to the order of"—

Mr. LOWE: Now, your Honor, I object. That check is in evidence.

Mr. HINDMAN: I know it is but does not show what is in writ-

the MASTER: Well, ask your question.
exception by complainants.

I will ask you if there is not a line following the words "The
oun County Bank" in which the words are in print "pay to
order of"?

Mr. LOWE: That I object to, your Honor, because the check is in
ence and speaks for itself.

he MASTER: He may answer.
exception by Complainant.

Yes, it is printed there.

And following these words the check, before it was filled out
you, was a blank line, wasn't it, that part?

A. Yes.

Q. You filled in that black line by written characters
the word "Exchange Bank," is that right?

Yes, sir.

Below that on the check was a blank line, at the left of which
the word "dollars" in print?

To the right of it.

To the right of it, I meant to say. That is true, isn't it?

Yes, sir.

In front of the word "dollars" and in the blank left for that
pose, you wrote in written characters "Twenty-seven and" in
ers and in figures "50/100"?

Yes, sir.

Making it read "Twenty-seven and 50/100 Dollars," is that
?

Yes, sir.

Below that is another blank line to the left of which is the
d "for" in print, isn't it, and to the right of the word "For" was
ank originally. That is true, is it?

Yes, sir.

Following the word "For" and on the same line but to the
t of the word are now written these words "Jas." the character
Susannah Smith rentals" in written characters; that is right,
it?

Yes, sir.

Who wrote that line?

I wrote it.

Will you please write those words for us now (handing blank
er to witness)?

Witness complies with request:)

Have you written those words?

Yes, sir.

Mr. HINDMAN (reading): "Jas. & Susannah Smith rentals." I
ask the stenographer to mark the line written by the steno-
grapher (paper so marked: Defendants' Exhibit 10).

Q. I will ask you now if it is not true that on the check to which your attention has been called, below the line upon which appear the words "Jas. & Susannah Smith rentals" is your signature, "E. N. Gillespie?"

A. Yes, sir.

Q. I will ask you if a part of that signature does not run above the line upon which appear the written words "Jas. & Susannah Smith" and also the line upon which appear the words "Twenty-seven and 50/100 Dollars?"

A. Yes, sir.

336 Q. You began your signature with a large "E" covering and extending upward above all of the blank lines referred to, isn't that true?

A. Yes, sir.

Q. The words "Jas. & Susannah rentals" appear to the left of that portion of your signature, do they not?

A. Yes, sir.

Q. The word "rentals," especially "Tals" appear across the bank stamp in which appear the words "paid Apr. 17, 1906" the circular stamp upon the face of the check; isn't that true?

A. Yes, sir.

Q. The "r-e-n-t-a-l-s" one word, the latter part of it especially the last three letters appear over a portion of that stamp, isn't that true?

A. Well, they are together; I couldn't say.

Q. Look at it and see if it does not appear across it?

A. I couldn't tell you whether it was or not.

Q. Couldn't you tell by looking?

A. No, sir.

Q. Isn't a part of the stamp obliterated by the letters "tals"?

A. Well, I wouldn't say whether it was or was not; I don't know.

Q. Is there anything wrong with your vision?

A. No, sir; nothing whatever.

Q. I will ask you if the words "Jas. & Susannah," the words are not written—the letters composing those words are not extended and not cramped close together?

A. Well, I don't know; that is my usual way of writing.

Q. How about the word "rentals?" I will ask you if that is not condensed almost one-half?

A. I couldn't tell you anything about it; that is the way it is written in there; that is all I can tell you about it.

Q. I will ask you if it was not necessary, in order to get in the words "Jas. & Susannah Smith" to contract the last few letters nearly one-half in order to keep in the space left after you had signed that check?

A. No, I wouldn't think so.

Q. How many letters in that word "rentals?"

A. Seven letters.

Q. All small letters, aren't they? How many letters in the word "Exchange" excluding the capital letter?

337 A. Seven.

Q. I will ask you if the word "Exchange" or the remainder

of it after excluding the large capital letter is not twice as long as the word "rentals" and both containing the same number of letters?

A. Yes.

Q. "Susannah." How many letters excluding the capital letter in that word?

A. Seven, I guess.

Q. Seven, Look at that word on this check, "u-s-a-n-n-a-h" on the same line with the word "Rentals," and state whether or not the space occupied by those seven letters are not double the amount of space occupied by the word "rentals?"

A. Well, it looks to be more, I wouldn't say it was double.

Q. Can you tell why these words "Smith" and "rentals" were so contracted there?

A. No, sir.

Q. You can't give any explanation for that?

A. My usual way of writing. I might spread it out or I might not.

Q. But you occupied all the space there was in which to write those words if those words were written after your signature, isn't that true?

A. They were written, I wouldn't say whether after or before. I may have after I signed the check wrote that in there.

Q. Yes, yes; in fact, you did?

A. No, sir; I put it in there at the time the check was drawn, when it was put in the bank.

Mr. HINDMAN: That is all.

Redirect examination by Mr. LOWE:

Q. Mr. Gillespie, when were the words "For Jas. & Susannah with rentals" written in there as regarding before presenting it to the Exchange bank for payment?

A. Why, they were written at the time the check was deposited.

Q. They were in there at the time the bank received it?

A. Yes, I put it in there so they would know what it was for.

Q. What was this twenty-seven and 50/100 Dollars paid to the Exchange Bank of Martinsville for?

A. For rentals of Susannah and Jas. A. Smith.

8 Mr. HINDMAN: Oh, that has been gone over.

The MASTER: That has been proved a number of times.

Exception by complainants.

Mr. LOWE: That is all.

Recross-examination by Mr. HINDMAN:

Q. Your purpose then in writing the words "Jas. & Susannah with rentals" was to let the bank know for whom the rentals were ended?

A. That is one of the reasons. Another reason was to keep track of what I expended it for.

Q. You was in the bank at the time and could have told them verbally what it was for, couldn't you?

A. Yes, sir; I did tell them.

Q. You did tell them?

A. Yes, sir.

Q. And unless that was on there, of course, you would likely get your accounts mixed, was that right?

A. Well, not necessarily so.

Q. It assisted in keeping your accounts straight, didn't it; it was for the purpose of future reference?

A. Yes, sir.

Q. And unless that was on there you could not tell by looking at the check what it was intended for, what it was given for; that is true, ain't it?

A. Why, I might have looked it up.

Q. Then if that is true how does it come that after that, you never in all of your other deposits and payments never made any such memorandum on the check?

A. Because the subsequent payments we had an office organized and kept good track of everything of that sort. At the time this payment was made we hadn't anything of the sort, and I was doing all the work personally, clerically and otherwise.

Q. Your checks would mean just the same whether you had an office organized, or not, didn't it?

A. Oh, mean just the same yes.

Q. Yes, and the purpose in keeping a memorandum on your check was to know what checks went to certain payments?

A. You will find some of those other checks have the names marked on as well.

339 Q. Just one, isn't that true?

A. I don't remember; there were several, I think had them.

Mr. HINDMAN: Well, the checks will show for themselves; that is all.

Hearing adjourned until 1:30 p. m.

1:30 p. m.

Mr. HINDMAN: Before introducing any witnesses in behalf of the defense we desire to have placed in the hands of the Master Complainants' Exhibit 10, being the check in controversy and the Defendants' Exhibit 10, the writing of Mr. Gillespie.

Mr. LOWE: Well, we object; you can offer it in evidence.

Mr. HINDMAN: It has been offered in evidence; we now ask that the Master inspect it.

The MASTER: Well, Complainants' Exhibit 10 is already in evidence. I supposed you offer Defendants' Exhibit 10.

Mr. HINMAN: And Defendants' Exhibit 10 if it has not been offered in evidence, we now do so.

Mr. LOWE: Complainants object, because it is wholly immaterial.

The MASTER: Well, I will now look at it.

(The original of which said Exhibit appears as follows:)

Defense.

And thereupon the defendants to maintain the issues on their part, introduced the following evidence:

Testimony of H. E. Wilcox.

Mr. H. E. WILCOX, one of the defendants, being first duly sworn, examined in chief by Mr. Hindman, and testified as follows:

Q. You may state your name to the court.

A. H. E. Wilcox.

Q. Where do you live, Mr. Wilcox?

A. Casey, Illinois.

Q. What is your business?

A. Well, I am in the oil business, producing principally.

Q. How long have you been in that business?

A. About seventeen years.

Q. Did you have any interest in any leases for oil and gas purposes in Crawford County, Illinois?

A. Yes, sir.

Q. You are acquainted with the Smith leases in controversy in these cases, are you not, Mr. Wilcox?

A. I am, sir.

Q. You may state what the fact is about your being the Wilcox who took the lease that has been introduced in evidence by the complainants in this case.

A. Well, I leased the Smith land along with some other land in March 1906.

Q. The James Smith and also the——

A. Susannah Smith.

Q. Susannah Smith land, the same land in controversy in these cases?

A. Yes, sir.

Q. After you took the leases for these lands, you may state—— well, you took the leases directly from these land owners?

A. I did, yes, sir.

Q. If you knew or had any information concerning a lease that formerly been given to Walton——

A. I did, sir.

Q. What, if any, investigation did you make as to whether the owner of the Walton lease had done anything in compliance with the terms?

A. Well, they showed me a copy of the old leases, of course, when I went to take my lease—before, previous to taking my lease; I did not—I went ahead and took my lease over the other leases; did not consider it any good. Then after that why I drove over there to Martinsville and went to the bank to see if any deposit had been made because Mr. and Mrs. Smith had also told me that there had been no money paid over to them.

Mr. LOWE: No, no; not what the Smith- said.

Q. If you made inquiry as to whether or not any of the conditions of the Walton lease had been complied with—You may state as a fact whether you did make any such inquiry.

A. I did. I made inquiry right in the start from them.

341 Q. From the Smiths?

A. From James A. Smith and from Susannah Smith, all the Smiths present.

Q. Did you learn from them that a letter had been received from the Martinsville Bank in relation to the matter?

A. I don't think so at that time. They had been there themselves they claimed, and made inquiry in regard to it.

Q. And you say you went to the Martinsville bank?

A. I drove——

Q. The Exchange Bank of Martinsville?

A. I drove to Martinsville Bank that day. I think it was on or close to—I am pretty sure it was the 23d day of March. I remember the day because I had some other transactions afterward in regard to the lease which makes me remember.

Q. And what inquiry did you make at the bank?

A. Well, I just simply went in and asked them if there was any rentals left there for the Smiths in regard to this lease.

Q. Of whom did you make that inquiry?

A. Well, from the cashier, or assistant cashier, I suppose. Now, I was not acquainted with the gentlemen, any of them; I just simply went in and asked and they didn't give me very much satisfaction, excepting to say that they didn't know anything about it; they didn't know anything about it, if there was anything of that kind they didn't know anything about it.

Q. Well, after taking the leases from the Smiths what developments, if any, did you make?

A. Well, we drilled a well on the Susannah Smith.

Q. When did you drill that well?

A. Well, we drilled a well along in April or May, finished up.

Q. Of the year 1906?

A. 1906.

Q. And what was the result of that exploration?

A. Well, we got a good deal of gas and an abundance of salt water and we really abandoned it and forfeited the lease.

Q. Surrendered it, gave it back to them?

A. Yes, I think the lease was surrendered later on.

Q. And when did you cease operation on the premises?

342 A. Well, we left the rig stand there for some time. I don't know—we got in a little trouble over the matter, and the rig stood there, I guess—part of the tools—on up until the fall some-time.

Q. Did you know afterward of a lease being executed by the Smiths of this same land to a party by the name of Allison?

A. Why, I understood there was. That was hearsay, though.

Q. Did you know of any developments being made afterward by the persons holding under the Allison lease?

A. Yes, sir.

Q. If you were acquainted with the developments that were made you may explain that to the court.

A. Well, I was just simply acquainted with them through hearsay and driving backward and forward past there, was all. I go right by the property every time pretty near that I go down to my other property, when I go down through with a machine or drive a team through, go right through that country.

Q. I will ask you if it is not a fact that the developments in the oil field at that time were matters of common knowledge among oil men and generally discussed among them?

Mr. LOWE: Oh, I object to that.

The MASTER: What is the purpose of offering that?

Mr. HINDMAN: The purpose—there has been some evidence, if the court remembers, that these parties were ignorant as to the developments being made and the vast amount of money that was being expended on this property. They were remaining idle and I wa-t simply to show that they knew but remained idle and acquiescent.

Mr. LOWE: Well, if he can prove that these folks knew it——

The MASTER: Well, I think you offered some evidence upon what was common rumor, didn't you?

Mr. LOWE: Well, I don't know. If it had not been proper and they objected——

The MASTER: Well, I think they objected to it. Well, I will let this in.

Exception by complainants.

A. Well, of course, it naturally was. That was always the case, you know, in any oil field; and when this was opened up in there close to the Smiths, why, it was, you might say, a pool within itself, right in that neighborhood at that time and it caused a great deal of discussion. People talked about it every place, of
343 course, all over the country, and every place you would hear something about it, that is, generally all through the oil business.

Mr. HINDMAN: I believe that is all.

Cross-examination by Mr. LOWE:

Q. When was this well drilled, Mr. Wilcox?

A. Well, I wasn't here right at that time, Mr. Cochran drilled that well for us.

Q. No, I wasn't speaking of that well; I was speaking of the other well, the one you say everybody talked about.

Q. Well, the first well that was got down there of any kind. Of course the Weaver well was drilled previously in 1905, but then——

Q. But I am asking you when the well was drilled in that you say the people, everybody was talking about, everywhere you go.

A. Well, I will tell you—I don't know as I could tell you exactly the first well that was drilled in, because there was a number of them drilled right away, just immediately as soon as they began to—a well was drilled on the Payne farm down there a good big well.

Q. What well did you mean then when you were talking that was drilled in there and everybody was talking about?

A. No, I am talking about the general run of wells of that field, in there. I don't know as I could tell you the first well and give you the date of it.

Mr. LOWE: Then, your Honor, I move to have the answer stricken, because it was not responsive to the question asked. He was asked in reference to the Susannah Smith.

The WITNESS: Well, I can tell you when that was dug.

The MASTER: Oh, well, that goes to the weight of his evidence; just let it stand.

Exception by Complainants.

Q. Who did you hear talking about the wells on the Susannah Smith place?

A. Well, I have talked with a number of the Standard Oil Company's people, and talked with Mr. Hennig there.

Q. When did you talk with any of the Standard Oil people?

A. Well, I talked with Mr. Hillman about it, and Mr. Kerr, about it, and Mr. Penn about it.

Q. Where?

A. At Casey, and—well, I know of two or three at
344 Casey—

Q. When was that?

A. Well, I couldn't give the date of it exactly.

Q. Give your best judgment?

A. Well, I would judge it was along in 1907, in the beginning of the year, along about that time.

Q. You would say, then, January or February, of 1907?

A. Well, along the beginning of the year sometime, yes.

Q. When was the first well put in on the Susannah Smith farm?

A. The first well?

Q. Yes, sir. I am referring now after you surrendered your lease.

A. Well, there were several other wells drilled before the Susannah Smith, I think—on the Payne and on the Bline, and I think on the James Smith, different wells in there before the Susannah was completed. I couldn't give the exact date of them, because I was not interested in any property in there at all at that time; didn't have any interest in them, and any more than just hearsay—any more than I just listened to it.

Q. Now, you may state to the court, if you know, when the first well was drilled on the land in controversy in this suit after you surrendered your lease?

A. After?

Q. Yes.

A. I couldn't tell you that.

Q. Can you give your best judgment about it?

A. Well, now, it would be just a rough guess, that is all I could make at it, you know, because I couldn't tell you exactly, because as I told you I was not interested in any property right around in that vicinity anywhere near there and I didn't pay any attention

ly just a little talk; you would naturally hear talk about it wherever they began drilling.

Q. Now, then, will you answer the question?

A. I answered as near as I could. I couldn't give you the exact date.

Q. Then when was it you talked with Fred Holman and James Herr and Mr. Payne of the Standard Oil Company as to the wells on either of the pieces of land in controversy in this suit?

A. Well, I don't know as I can give you the date of them either, because we always talked about any kind of an occurrence like that when we would get together.

5 Q. Can you state positively that you ever talked to either of those three gentlemen?

A. About that field when it was opened up?

Q. Now, just let me ask you my question and then you may answer. Can you or will you state positively that you ever talked with either of those three men about the well, either of the wells on either of the tracts of land in this suit after you surrendered your lease?

A. No, sir; I wouldn't; not to speak of any particular piece I couldn't—

Q. Then you are mistaken about having talked about the well on the Susannah Smith place?

A. I didn't say on the Susannah Smith.

Q. Or on the James Smith?

A. I didn't say that.

Q. You didn't mean to convey that idea?

A. I was talking about that field, that pool of oil in there, the Sinclair pool.

Q. And you say you don't know when the well was drilled on the land in controversy after your surrendered your lease?

A. No, I couldn't give you the date of it at all.

Q. Do you know who it was you asked concerning the rentals at the Martinsville Exchange Bank?

A. Well, now, I don't know the names of any of them, but now I'm pretty positive the gentlemen that was on the stand here this afternoon.

Q. You men Fred Sinclair?

A. I think that is the man, pretty positive. There were two or three men in the Bank.

Q. And what was it he said?

A. He said he didn't know anything about it; didn't know anything about it.

Q. And that was the 23d of March, 1906?

A. 1906.

Q. When did you abandon the land in controversy in this suit—these suits insofar as your leases were concerned?

A. Well, I sold all of my interest along about in May in them leases, but then the other party did not abandon until in the fall of that time. I don't remember just what time they did. I sold to Mr. Lamb and Mr. Sherman Haskell and Mr. Mike Long.

Q. You don't know exactly what time they abandoned it?

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A. No, I couldn't tell you that.

346 Q. You said a while ago the leases were surrendered up. Who surrendered the leases?

A. I don't know that they were surrendered; I said the leases went by forfeiture or were surrendered; *I said the leases went by forfeiture or were surrendered.* I don't know how they done that.

Q. When do you say you took your leases, Mr. Wilcox?

A. I think it was the 23d of March, 1906.

Q. And then was it you completed your well?

A. Well, I think it was completed in May; I was up in the Northwest at the time when that well was drilled in, but I think it was along in May sometimes, May or June.

Q. Well, didn't you state in answer to a question of Mr. Hindman's that it was drilled in March?

A. Oh, no; no, sir, I think not.

Q. Aren't you mistaken as to the time, now, wasn't it in June, in reality?

A. Well, it was started in May; I know they moved the tools and everything in before I went away.

Q. Well, my question was when it was drilled in?

A. Well, I couldn't tell you when it was finished.

Q. You say you weren't at home when the well was drilled in on your lease?

A. No, I was not; I wasn't at the well at all when it was drilled in; wasn't back until after it was drilled in.

Q. What time did you come back?

A. Well, I don't remember just what time I come back. I was out past the well; I never even stopped at the well, or had anything to do with it afterward, because I sold my interest just a short time after that, about the time the well was finished in that and the McKee stuff and all the stuff in there.

Q. Well, now, I wish you would tell me when you came back.

A. Well, now, I expect I can give you the exact date if you will give me enough time.

Q. Give you all you want, all I want is for you to answer.

A. Well, if you will let me get my dates when I come back from the Northwest, I will—

Q. Well, now, have you got them here?

A. No, sir; I have not.

Q. Well, then, give your best judgment, if you can approximate it.

347 A. Well, I think I came back along about the middle of June, or a little later than that. I went up there on a business trip, principally what I went for.

Q. You would say from the 15th of June until the last, you would say along there sometime?

A. Yes, somewhere along there.

Q. By the Northwest you mean the northwestern part of the United States?

A. I was up in Williston, North Dakota and up in Nebraska and up in that country.

Q. Now, when did you go up there?

A. Well, I was up there about two or three weeks all together; I've got a brother-in-law that lives up there and I was up to his place a while.

Q. And then when did you leave,—about the first of June?

A. No, a little later than that; along about the middle of June, I think; something like that, but I didn't go out to the well until a little while after I came back.

Q. You left here about the middle of June, you think?

A. No, I didn't leave here; I got back here somewheres along about that time.

Q. Well, I asked you when you left here and you said along about the middle of June?

A. I think not.

Q. Well, now, in order that you may get it straight in the record, when did you leave here, that is what I want to know.

A. Well, I left here about the first of June, or sometime in May.

Mr. LOWE: You are excused.

Redirect examination by Mr. HINDMAN:

Q. Did you ever receive any notice from Mr. Gillespie or from any person associated with him or any person or holding or claiming an interest under the Walton lease in relation to developments on the land with property?

Mr. LOWE: I object, your Honor; I didn't ask him a word about that.

Mr. HINDMAN: Why, no, of course not.

Mr. LOWE: It was not redirect then.

Mr. HINDMAN: Very true. I am asking the question as original examination.

The MASTER: Well, if he wants to ask it in chief, why he can ask it in chief.

Mr. LOWE: That is all right; I have no objection to that.

A. I never did from anyone.

Mr. HINDMAN: Take the witness.

Recross-examination by Mr. LOWE:

Q. You say you were never served with any notice at all?

A. No, sir.

Q. Nobody ever talked to you for Gillespie?

A. No, sir. Nobody ever interfered with me in any way, shape or form.

Q. I didn't understand.

A. Nobody ever interfered with me in any way, shape or form in regard to drilling the well.

Q. Do you know C. B. Coulter, the present Sheriff of Crawford County?

A. Yes, sir.

Q. Did he on the 15th day of June, A. D. 1906, serve a notice on you about Gillespie owning the land in this case, claiming to own the lease?

A. June 15th?

Q. June 15th, 1906?

A. Now, I couldn't say that he didn't, but I don't remember of it.

Q. Well, you just now said that you never received any notice.

A. I don't think I did; I don't remember of it.

Q. Well, now, you may be mistaken about that?

A. I might have been. I don't think he did, though. Have you got the notice there—served on me, was it?

Q. Yes, sir; the sheriff says so. The sheriff returned it N. J. Haskell by C. B. Coulter, Deputy, on the 15th day of June, 1906. Now, you say you might be mistaken about that?

A. I might be, but I don't think the notice was served on me. It may be that it was; of course, I wouldn't dispute an officer.

Q. That is right.

A. If he made his affidavit to it, but I don't think that it was. I am not interested in this case in any way as far as that is concerned. I am just simply telling what I—

Mr. LOWE: That is all.

349 Redirect examination by Mr. HINDMAN:

Q. You were out west at that time, weren't you, and not in the State of Illinois?

A. Well, I think that I got back somewhere along about that time, but I do not remember anything about this notice being served on me.

Q. After the well was drilled, wasn't it?

A. Yes; after the well was drilled.

Mr. HINDMAN: That is all.

Testimony of J. A. Smith.

Mr. JAMES A. SMITH, one of the defendants, being first duly sworn, was examined in chief by Mr. Hindman, and testified as follows:

Q. You may state your name.

A. James A. Smith.

Q. You are the same James A. Smith who is named as one of the defendants in this case?

A. Yes, sir.

Q. What relation are you to Susannah Smith?

A. Her son.

Q. Your mother is a widow?

A. Yes, sir.

Q. You may state what the fact is about your having lived with her in the same house with her along in the year 1905 and 1906?

A. Well, I lived at home with her; I was not married at that time and stayed there and lived with her.

Q. And looked after her business at that time?

A. Yes, sir.

Q. And have been doing so since?

A. Yes, sir.

Q. Do you know anything about the execution of a lease to M. A. Walton in May 1905, have you any recollection of that transaction?

A. Yes, sir.

Q. You are the owner of a tract of land in Crawford County, Illinois?

A. Yes, sir.

Q. Joining your mother's?

A. Yes, sir.

Q. You may state whether or not you and your mother at the same time and as a part of the same transaction executed, each of you executed a lease to this man Walton?

A. We did.

Mr. LOWE: To that I object, your Honor. He said it was the same transaction; to that part of it I object.

The MASTER: Well, it may be preliminary. There is nobody claims but what they did lease to Walton.

Mr. LOWE: Well, but the same transaction; he said each the same transaction. To that part I object.

Mr. HINDMAN: Oh, I thought we were trying a lawsuit. I meant the same transaction the same day.

The WITNESS: The same day?

Mr. HINDMAN: Certainly.

The MASTER: Well, go ahead.

Q. And in fact both leases were discussed and the negotiations went on at the same time, weren't they?

A. Yes, sir.

Q. And in fact was a part of the same transaction?

A. Yes, sir.

Mr. LOWE: To that I object.

The MASTER: Well, the answer may stand. Of course, the written evidence shows it was two different transactions.

Exception by complainant.

Q. Who were present at the time these negotiations were carried on?

A. At the time it was lease-

Q. Yes, at the time the bargain was made, the agreement was made?

A. Well, I can't state exactly.

Q. Were there two people there?

A. Yes, sir.

Q. Do you know their names?

A. Yes, sir.

Q. Who were they?

A. Tom Pierce and M. A. Walton, if that is his initials.

Q. Did they leave a copy with you of the lease that you executed?

A. Yes, sir.

Q. Have you got that copy?

A. No, I have not.

Q. With you?

A. No, I haven't got that copy.

Q. Are you sure you have not a copy of that lease?
351 A. Of the M. A. Walton lease?

Q. Yes, o
A. Well, I will look.

Mr. HINDMAN: I am sure you have.

The WITNESS: I will take it back; I have it (handing paper to Mr. Hindman).

Q. You may examine this paper marked by the stenographer Exhibit 11 and state whether or not that is the copy of the lease that was left with you?

A. Yes, sir; that is a copy.

Q. Now, after these leases had been executed to Walton did you and your mother execute a lease or leases to someone else?

A. We did sometime afterward.

Q. About how long afterward?

A. Well, a year or more—I don't exactly—

Q. You have reference now to the Wilcox lease?

A. Yes, sir.

Q. That was the second lease that you executed?

A. That was the second one.

Q. You and your mother both at the time executed a second lease to Wilcox, is that right?

A. Yes, sir.

Mr. LOWE: Now, just a moment, your Honor. This is one of the defendants, and I don't want to be interrupting, but I must insist that he recite what was done without counsel suggesting.

Mr. HINDMAN: I think that objection is well taken.

The MASTER: Well, keep within the rule.

Q. What if anything had been done under the Walton leases up to the time that you and your mother executed a lease to Wilcox?

A. Nothing that I know anything about.

Q. Had any rentals been paid?

A. Not a cent.

Q. Had any been deposited to your credit in the Exchange Bank at Martinsville?

A. If there had I couldn't get no track of it.

Q. Did you make any inquiry or attempt to ascertain whether there had or not?

A. Yes, sir.

Q. Before executing the Wilcox lease?

A. Yes, sir.

Q. What effort did you make to ascertain?

352 A. I wrote a letter to the bank and asked them if there was any rental deposited for me or my mother under the Walton lease.

Q. Did you ever receive any reply to that letter?

A. Yes, sir.

Q. I will hand you a paper marked Exhibit 9, Defendants' Exhibit 9, and you may state whether or not that is a letter you wrote, and to which you now refer (handing paper to witness)?

- A. Yes, this is the letter I wrote to the bank.
- Q. And upon a part of the same sheet at the bottom I will ask you if that is the reply that you received?
- A. Yes, sir.
- Q. Did you receive that by mail?
- A. I received that by mail.
- Q. After writing the letter and getting that reply, what else, if anything did you do to ascertain whether or not any payments had been —?
- A. I went to the bank in person.
- Q. Anyone accompany you to the bank?
- A. No, sir.
- Q. About when was it that you went to the bank?
- A. A few days before I leased to Wilcox.
- Q. Have you now in mind the date of the Wilcox lease?
- A. No. I don't remember the date.
- Q. If it bears date of March 23, 1906, then when with respect to that date, was it that you went to the bank?
- How was that?
- Q. If the Wilcox lease bears date March 23, 1906, when with respect to that date did you go to the bank and make inquiry concerning the rental?
- A. A few days before that time.
- Q. A few days before. What did you do when you got to the bank?
- A. I went in and went up to the desk and asked a man in there there was any money deposited to the credit——
- Q. Now, who was that man?
- A. Well, I don't remember exactly, but it was this man Sinclair.
- Q. It was someone in charge of the bank there?
- A. Yes, sir.
- Q. And what information did you get?
- A. He told me there was no money deposited there.
- 53 Q. Did you make inquiries for your mother and for yourself, also?
- A. Yes sir; both of us.
- Q. Then after receiving the letter and making investigation of the bank you and your mother executed the Wilcox lease?
- A. Yes sir.
- Q. After the Wilcox lease was executed you may state whether or not under the Wilcox lease a well was put down on the premises, — either one of your farms?
- A. There was on the homestead lease.
- Q. And was that well afterward abandoned?
- A. Yes, sir.
- Q. That was not an oil-producer?
- A. No sir.
- Q. Now, up until that well was put down, did Gillespie or anyone that he is associated with, or anyone claiming under the Walton lease, make any attempt to make any development to make any development on the premises?

A. Not at all.

Q. Or pay any rental to you?

Q. Or to do any other things by way of taking possession of the premises?

A. Not that I know of.

Q. After the Wilcox experiment you may state whether or not he surrendered the lease to you?

A. Yes, sir.

Q. Then what did you do, if anything, by way of making a further lease on the premises, you and your mother?

A. Well, we leased it again, sometime afterward.

Q. To whom?

A. To one C. E. Allison.

Q. Do you remember the date of that lease?

A. Not exactly, but I believe it was August 9th, for I have a copy of it. I will look (witness examines paper) I find this Allison lease dated August 9, 1906.

Q. Now, before executing that Allison lease what had been done by Gillespie or anyone associated with him or claiming under the Walton lease on the premises?

A. There had nothing been done.

Q. Did you receive any rentals?

A. No, sir.

Q. Your mother executed a lease on her land on the same date, August 9th?

354 A. Yes, sir.

Q. Now, on the day of the Allison lease, what inquiries were made or steps taken to ascertain whether or not there had been any rentals paid under the Walton lease?

A. Well, this man Allison called up the bank from mother's house.

Q. Your mother had a telephone in her house at that time?

A. Yes, sir.

Q. And you were living with her then?

A. Yes, sir.

Mr. LOWE: Did you hear him?

A. Yes, sir.

Q. You say the bank. What bank do you have reference to?

A. The Exchange bank at Martinsville, Illinois, where this money was to be deposited.

Q. You may state whether or not he made inquiry as to whether there had been any rentals paid for you or your mother?

A. Yes, he called up the bank and talked to them there, and he said—

Mr. TROUP: Wait, don't tell what he said.

Mr. HINDMAN: No, I suppose what he said to you would hardly be proper. I simply want the fact, if you heard him call the bank and make inquiry.

Q. After the Allison lease was executed were there any developments on the premises there?

A. None, only what Wilcox did.

Q. None since that, after the Allison lease?

A. After it?

Q. Yes, afterward?

A. Yes.

Q. I wish you would describe to the court now just what developments were made, what improvements were put upon the premises, and what was done in the way of operating under the Allison lease.

A. Well, there has been quite a number of wells drilled.

Q. About how soon after the Allison lease—

The MASTER: Well, which land is this on, his land? You are asking him about his land?

Mr. HINDMAN: His land and his mother's land.

The MASTER: Well, you had better keep them separate, hadn't you?

355 Mr. HINDMAN: Well, I don't know which one the operations commenced on.

Mr. LOWE: He does, he can tell you, I suppose.

Q. Certainly; go ahead and describe what developments were made, and whether on yours or your mother's.

A. Well, the first development that was made was a gas well drilled on my place.

Q. Under the Allison lease?

A. Under the Allison lease.

Q. Who did that, who drilled that well?

A. Willett & Little.

Q. Well, go on, tell what else was done.

A. Then there was—the next well that was drilled on the place was drilled on mother's land.

Q. And who did that?

A. Willett.

Q. And what was that,—an oil or gas well?

A. That was an oil well, producer.

Q. And—Well, go on.

A. And there was other wells drilled on the place after that.

Q. How many and what were they?

A. There was three more wells drilled on mother's place.

Q. By whom?

A. Well, I couldn't say.

Q. Well, whether it was under the Allison lease?

A. It was on the Allison lease, but I couldn't say whether the men Willett & Little drilled the wells or whether Solley and Johnson drilled the wells, but it was operated on the Allison lease, operated under the Allison lease.

Q. Were there any more wells put down on that land?

A. Yes.

Q. How many?

A. There was five all together.

Q. Three on your mother's and two on yours?

A. No, there was—Do you want to know how many there is all told opened out there?

Q. Well, I want you to go on and tell what developments were made on yours and what on your mother's.

A. Well, on her place there is six wells drilled all together, oil wells, producers, and there is five producing wells on my place, besides the gas well.

356 Q. What other improvements, were put on there.

A. Power houses, boiler tanks, pipe lines—

Q. Now, you speak of that power. Will you describe to the court what you mean by a "power."

A. Well, there was machinery put in there to pump these wells, to pump the oil out of the wells into the tank.

Q. And you may state whether or not it is the central plant from which all the wells are pumped?

A. Yes, sir.

Q. And rods extend from the central power to the various wells to operate them?

A. Yes, sir.

Q. When was that power placed upon the premises?

A. Well, I don't know exactly, but it was in the fall of 1906, I believe.

Q. Were there tanks erected on the premises at that time?

A. Yes, sir.

Q. And derricks?

A. Yes, sir.

Mr. TROUP: If the court please, I would suggest that Mr. Hindman do this testifying.

Mr. HINDMAN: I am trying to get him to tell what improvements were on there.

Mr. TROUP: Well, ask him, and let him tell.

Mr. HINDMAN: Well, I will submit you the record that I have.

Q. Go ahead and tell what improvements were placed upon them.

The MASTER: Tell everything that was placed on there.

A. Well, I think I have told about all, haven't I? I tried to, at least.

Q. I wish you would describe that powerhouse and the power plant, tell the size of it, whether it is a small affair, or whether it is a large affair; what it is like to a person that has never seen it and wouldn't know whether it was the size of a coffee-mill or factory.

A. Well, it is a good-sized piece of machinery, 25 or 30 horse engine, gasoline, gas engine.

Mr. LOWE: What horsepower did you say?

A. It is either 25 or 30, I won't say which.

Q. Any roof over it?

A. Yes, sir; it is in a sheet iron building erected over the—

357 Q. About how large is that building?

A. Well, I would judge it was 30 feet long and 14 wide, I think.

Q. And about how wide.

A. About 8 feet, 7 1/2, something like that; I never measured it, I couldn't tell.

Mr. HINDMAN: Take the witness.

Cross-examination by Mr. LOWE:

Q. You don't know anything about the size of these powerhouses, do you?

A. Well, not much, I don't. I don't know how to explain them.

Q. This defendants' Exhibit 11, that is the lease or copy left by Mr. Walton, is it?

A. Yes, sir; that is the copy of the lease.

Q. What rental was you to receive under this lease?

A. Well, he told me when I signed up the lease he would give me the rates of 25 cents an acre.

Q. By the year?

A. Yes, sir.

Q. Well, how often?

A. Every year.

Mr. HINDMAN: That isn't cross-examination.

Q. What does your lease say?

A. This copy says 25 cents per acre.

Q. How?

A. Per year.

Mr. SIMMONS: Now, wait. We are objecting to that, your Honor, because Mr. Hindman never asked him anything about the contents of it; he just simply——

Mr. LOWE: He called it Defendant's Exhibit 11, I now offer it in evidence.

Mr. SIMMONS: We object to it.

The MASTER: Well, wait until you get through with this witness on the stand.

Q. You say at the time of the execution of the Wilcox lease you went to the bank and they told you there wasn't any rental there?

A. Yes, sir.

Q. Was there any rental due at that time?

A. Yes, sir.

358 Q. How much?

A. Well, the first rental that there was to be paid was due. It would be one-fourth of the 25 cents per acre.

Q. When was that due?

A. That was due the 22d day of February.

Q. The 22d day of February.

A. Yes, sir.

Q. Now, when was it you wrote—when did you say you wrote the bank?

A. (After examining paper.) This letter gives the date March 16, 1906.

Q. Well, that is the correct date, isn't it, you wrote it at that time?

A. Yes, sir.

Q. Now, then, how long was it before you wrote that letter that you called on the Bank at Martinsville?

A. How long before, did you say?

Q. Yes.

A. Well, I called there at the Bank afterward.

Q. How long afterward did you say?

A. Well, I don't remember exactly.

Q. Well, would you say it was a month or two months?

A. Yes, something like that, about the time I leased to Wilcox.

Q. Well, was it before or after that time?

A. It was after this letter—

Q. No, you misunderstand me. Did you call on the bank before or after you leased to Wilcox?

A. It was before.

Q. How long was it between the time you wrote the letter and the time you called on the bank?

A. Something like a month, as well as I remember. It may have been longer than that.

Q. It might have been two months?

A. Yes.

Q. You don't remember. Wasn't it three months after the letter was written that you called on the bank again?

A. It might have been; I couldn't say positively.

Q. Let me ask you if it isn't a fact that it was along about the Holidays of the next year after you gave the lease to Wilcox?

A. If I remember right.

Q. It might have been that time?

A. Yes.

359 Q. What did the banker tell you when you went there at that time?

A. He told me there was no rental there for me.

Q. Can you tell me the time when you went there with Mr. Solley and some other gentleman and they told you how much rental was due you?

A. Yes, sir.

Q. When was that?

A. The 25th day of January, I believe, nineteen—I don't know whether six or seven.

Q. Well, what is your best memory?

A. (Witness examines books.)

Q. Now, wait a minute. When did you write what you have got there; I don't ask you what it is; I ask you when you did it.

A. When I did it?

Q. Yes.

A. Just a few days ago.

Q. Yes. Well, then I object to refreshing your memory with anything you have got there that you made just a few days ago. Now, when was it you went there with Mr. Solley and the other gentleman—Who was with you and Mr. Solley?

A. Mr. Brandt.

Q. What is his name?

A. Zim Brandt.

Q. Brandt or Brindt?

A. Brindt, I guess it is.

Q. Now, then, give us the date when you and Mr. Solley, the defendant in this case and Mr. Brindt went to the bank.

A. I think it was the 25th of January.

Q. What year?

A. 1907, I believe.

Mr. HINDMAN: I don't believe that is cross-examination, your Honor.

The MASTER: Well, what I want to know is, how is all this evidence material to this case anyhow?

Mr. HINDMAN: We made inquiry of the witness as to when he went to the bank and was informed there was no money there. Now, they are making inquiries of an occurrence long subsequent to that, about which there was no inquiry in chief. The objection is that it is not cross-examination.

The MASTER: Have you charged here in your answer that
360 this lease was void of Walton's, that it terminated the Walton lease?

Mr. HINDMAN: Yes, but my objection is based on a rule of evidence, but they are not making inquiries concerning something that was not inquired about in chief.

The MASTER: Well, what I am trying to get at is how any of this evidence, what bearing it has on this case?

Mr. TROUP: Well, it would be material in this respect, if your Honor please. They have gone into this matter to show that they have exercised a great deal of diligence to find out about these things. Now, we have a right to go clear through with it. We are not bound by the limited extent that they went into it.

The MASTER: Well, you can fill this record just as full as you want to but I don't know whether any of this is pertinent to the issue, or not. Go ahead.

Exception by defendant.

Q. I understood you to say you did not know when it was.

A. Yes, sir; I still say that I don't remember the year exactly, but to my knowledge it was 1907.

Q. Well, now who went with you?

A. Mr. J. W. Solley and Mr. J. Brindt.

Q. Now, what did the banker tell you at that time?

A. Well, we went there for the purpose of getting a statement of the accounts that was deposited there to my credit and to my mother's credit.

Q. Well, you got it, didn't you?

A. Yes, sir.

Q. By the Banker?

A. Yes, sir.

Q. And it was correct, wasn't it?

A. Yes, sir.

Q. And that you think was in January 1907?

A. That is what I say.

Q. Now, when was this well drilled on the premises, the first one under the Allison lease?

A. Which,—the first well?

Q. Yes, sir. And you will understand now that we are referring to each tract of land owned by yourself and mother in litigation in this case.

A. The first well, if I remember right was drilled in the fall of 1906.

Q. Now, then, what premises was that on—was that the home-
stead?

361 A. No, sir.

Q. How?

A. The Allison?

Q. Yes.

A. No, Allison had no lease at that time.

Q. Well, now, what time in 1906 was the Allison lease drilled first?

A. In the month of November, I believe.

Q. November 1906?

A. Yes, sir.

Q. Was that an oil or gas well?

A. It was a gas well.

Q. And what became of that?

A. Well, they used the well for fuel of some kind.

Q. Then what did they do next after the gas well?

A. They drilled other wells, drilled oil wells.

Q. On you- or your mother's land?

A. Well, the next well was drilled on her land.

Q. And when was that well completed?

A. I don't remember but it was about—it was in the spring of 1907.

Q. Then where did you drill next?

A. They drilled more wells on her place. They drilled four over on her place—five in all before they drilled any more—

Q. And now when was the power house built?

A. I don't remember whether it was in the fall of 1907 or in the spring of 1908.

Q. Now, a while ago you said it was in 1906. You was mistaken. You didn't intend to say that, did you?

A. No, sir.

Q. You say in the fall of 1907 or spring of 1908?

A. Yes, sir; if I remember right, now. If I said 1906 a while ago I didn't intend to say it.

Q. How did you come to give the Allison lease on your premises?

A. Well, he come to me and told me if I would give him a lease on it that—he came to me and wanted to lease the land and I told him—Well, he told me what he would give me and so I leased to him.

Q. What did he tell you?

A. He told me if I would lease it to him he would give me \$15 per acre for the lease.

Q. Well, \$15 per acre what?

362 A. Per year.

Q. You mean \$15 bonus?

A. Yes, sir.

Q. You mean he would pay you a rental of \$15 a year?

A. No, sir; he would pay me \$15 bonus an acre.

Q. Well, when was he to pay you that?

A. He was to pay me that at the completion of the first paying well.

Q. And did he do that?

A. No, the rental—that hasn't been paid yet.

Q. Hasn't been paid yet?

A. No, sir.

Q. Did they know anything about the Walton lease when Allison and you—Did he talk to you anything about that?

A. Yes, sir.

Q. What promise did he make to you about that?

A. Which, the Allison lease?

Q. No, I mean what did Allison promise you about the Walton lease?

Mr. SIMMONS: Now wait your Honor, we object to that as not being cross-examination and not being proper evidence anyhow; we object for Little & Willett.

The MASTER: If you are trying to show now some promise that is not included in the lease you will have to use him as your witness. They didn't ask him anything about the conversation with Allison.

Mr. LOWE: No, but they asked him about the lease; now, I have a right to everything that was said and done.

The MASTER: I don't think that is cross-examination. If you want to use him as your witness, you can ask him about it.

Mr. LOWE: The court holds that we can't ask him on cross-examination.

The MASTER: Well, I don't see how it is cross-examination where they merely identify the lease. I don't think it is cross-examination, and furthermore I don't think it is competent evidence, but you can ask him if you want to make him your witness.

Mr. LOWE: Well, we will not at the present time. We will go on with the cross-examination.

Exception by complainant.

Q. Now, you spoke about Allison calling up—was it Allison called up the Bank?

363 A. Yes, sir.

Q. Did he say what bank he wanted?

A. He said he wanted the Exchange Bank at Martinsville.

Q. And when was that?

A. About the time he was trying to lease the land.

Q. How long before the lease was given?

A. Some two or three days.

Q. And didn't you know at the time that the money was in the bank, hadn't you found it out then that the rental was there?

A. Yes, sir.

Q. You knew it at the time and told Mr. Allison, didn't you?

A. Yes, sir.

Q. That the rentals had been paid there for you?

A. Yes, sir.

Q. You stated that the first gas well was drilled on your place by Willett and Little under the lease. Don't you know that Little had no interest in it at all but that Willett owned it?

A. I didn't know anything about it.

Q. Why, you said a while ago that Willett and Little drilled the well. Now, don't you know that Little didn't have anything to do with it; that Willett owned it by himself and that the record showed that fact?

A. No, sir; I didn't know that he didn't have any interest in it. He went under the head of Little and Willett, oil and gas.

Q. Do you mean to say that there is any such firm or partnership as Willett and Little Oil and Gas Company, Mr. Smith?

A. Well, they said they owned it together.

Q. Well, you are stating now that it went under the name of Little & Willett, Oil and Gas. Now, don't you know that there was never such a gas company either incorporated or partnership?

A. Well, I don't know whether it was incorporated, or not.

Q. In answer to Mr. Hindman's question that there had been nothing done by Mr. Gillespie or that you had received no rentals from the Walton lease you meant by that you had not received it from the Bank?

A. Yes, sir.

Q. But Gillespie had done his part. He had paid it at
364 the place where he said he would pay it to you, but you had not taken it from that place?

A. Yes, sir.

Mr. SIMMONS: Now, we object to that, your Honor, wholly a conclusion that Gillespie had done his part.

The MASTER: Well, I suppose he means his part toward paying the rentals, at any rate I will assume that is what he means.

Exception by defendant.

Q. The Sheriff served a notice on you, didn't he, about this matter, Mr. Smith, on the 15th day of June, 1906?

A. I don't know whether he did or not.

Q. Well, do you know that he didn't?

A. I don't know that he did not I don't know that he didn't.

Q. Well, did he serve a notice on you about that time?

A. Well, I don't know. I have the only notice here that was ever served on me.

Q. Well, you have got a notice that was served on you?

A. I have got a notice that was served on me.

Q. By whom?

A. Well, it was mailed to me.

Q. Mailed to you?

A. Yes, sir.

Q. Did you ever see a notice posted on a derrick on a farm, either one of the farms in controversy in this case, or any land owned by your mother?

A. Yes, sir.

Q. Who was with you at that time?

A. The Deputy Sheriff.

Q. And who else?

A. I don't remember—

Q. Was Mr. Harris, your brother-in-law?

A. I won't say certain whether he was or not.

Q. Well, at the time you and the Deputy Sheriff went up there do you mean to say that he never served a notice on you?

A. He didn't serve any on me.

Q. He didn't serve any on you, he didn't read it to you?

A. No, sir.

Q. Didn't he give you a copy of it?

A. No, sir.

Q. Did you know anything about his having a notice?

A. Yes, sir; I knew he had one, for he took and nailed it on the rig.

365 Q. Did he read that to you, explain to you what was in that?

A. I don't know that he did.

Q. Do you know that he did not?

A. No, sir.

Q. Did you read what was on that notice?

A. Yes, sir.

Q. On the derrick. Was your name on that anywhere, on that notice?

A. I think it was.

Mr. LOWE: You may ask him.

Redirect examination by Mr. HINDMAN:

Mr. HINDMAN: Just a moment, a little further examination in chief; a matter that I overlooked before.

Q. Mr. Smith, did you receive any notices from the Martinsville State Bank in relation to rentals being left in the Bank?

A. Yes, sir.

Q. How many did you receive?

A. I don't remember—three or four.

Q. When did you receive the first one?

A. Sometime in April.

Q. Of what year?

A. 1907, I believe.

Q. When did you first—

A. Or six—

Q. Learn that there was any money left in the bank for you?

A. When I received that first card.

Q. That is the first information you had that there had been any money left in the bank for you?

A. Yes, sir.

Q. I will hand you this bunch of cards and you pick out the first card or the one that brought you the information (handing package of cards to witness).

A. I think this was it (indicating card).

Q. You say this. You have reference to the card marked Exhibit 1?

A. Yes, sir.

Q. That bears date of May 13th, 1907?

A. Yes, sir.

366 Q. Now, I will ask you if up until that time you ever had any information that Gillespie or anybody else under the Walton lease had ever left any money at the bank for you?

A. That is the first notice I ever knowed of any money being there.

Q. Well, the first knowledge you had of that fact?

A. The first knowledge, yes sir.

Q. Now, do you know when the Walton lease—I don't mean the Walton, I mean the Allison lease, was executed, the C. E. Allison lease?

A. Yes, I have a copy of it.

Q. Well, refer to it and refresh your recollection.

A. (Witness refers to paper.)

Mr. LOWE: August 1906, he said so awhile ago.

A. Yes, that is when it was.

Q. Now, Mr. Smith, I want to ask you if at that time, at the time of the execution of the Allison lease, you had received any money or had any knowledge or notice or information that any money had been deposited in the bank for you under the Walton lease?

Mr. LOWE: I insist that the witness answer the question without examining the paper.

The MASTER: Oh, he can answer.

Exception by complainants.

A. I can't answer that without——

Q. Why so, Mr. Smith——

Mr. LOWE: Well, now, your Honor, just a moment. I want this witness to testify. He has already testified on cross-examination that it was at the time Allison took that lease that he knew that the money was there at the bank.

The MASTER: I heard him testify. Go ahead and ask your question.

(Question read.)

Mr. LOWE: Now, I object to the witness looking at different papers to try to see which kind will suit. He has already testified to the date of the Allison lease, which is August 1906.

The MASTER: Well, he has a right to refer——

The WITNESS: If I have a right to look I will answer the question and if I ain't, I will not.

Mr. HINDMAN: Why, certainly, go ahead and do it.

The MASTER: Go ahead and refer to your papers, and if
367 you can answer, do it, and if you can't answer, why, say so.
Exception by complainant.

A. I find here that the statement from the Bank, Sinclair's signature, that the first rental was deposited there April 7th, 1906.

Q. Yes, the statement—where did you get that information?

A. Where did I get this?

Q. Yes.

A. I got this about the 25th day of January.

Q. What year?

A. 1908.

Q. 1908? Yes, but did you know in 1906 that there had been money deposited in the Bank?

A. No, sir.

Q. Or 1907?

A. No, sir.

Q. Until you received this card?

A. That is the first date and that says May 13, 1907.

Q. By "this card" I mean the card marked Exhibit 1?

A. Yes, sir.

Q. Now, if you have ever——

The WITNESS: He had me bothered. I didn't know what he wanted to know.

Q. Yes, well now if you are straightened—in cross-examination, you said "yes" to a question put to you by Judge Lowe as to whether or not at the time the Allison lease was given you know that money had been deposited in the bank and told Allison so; is that true?

A. No, sir.

Q. I will ask you is it not true that Mr. Allison called up the bank from your mother's house to make inquiry concerning the rental?

A. He did.

Q. Now, you *was* asked about making a visit to the bank in company with Mr. Solley, I believe it was.

A. Yes, sir.

Q. When was that?

A. On the 25th day of January, 1908.

Q. Yes, sir. That is when they gave you the statement——

A. Yes, sir.

Q. Showing that money had been on deposit prior to that time?

368 A. Yes, sir.

Q. I will ask you if that was not after they had commenced this suit in the State Court at Robinson?

A. Yes, sir.

Q. I will ask you to examine these cards, Exhibits 1, 6, 7, and 8 respectively (handing cards to witness), and state to the court

whether or not these are all the notices you received from the bank in relation to deposit?

A. These are all the notices that we received.

Mr. HINDMAN: Now, if they have not been introduced in evidence, we desire to introduce them.

Q. Now, I will hand you Exhibits 2, 3, 4, and 5 (handing papers to witness) and ask you if you know whether or not those are the notices that were received by your mother?

A. Yes, sir; they were notices received by Mother.

Q. You may state whether or not you and your mother received those notices at the same time?

A. I think about the same time.

Q. In other words, when you would receive a notice she would receive a like notice?

A. Yes, sir.

Mr. HINDMAN: Now, if they have not been introduced in evidence, we desire to have them introduced. I think that is all.

Recross-examination by Mr. LOWE:

Q. Now, James, you say the first information you received about this rental being deposited there was on these cards?

A. Yes, sir.

Q. Never knew a thing about it till you got them?

A. No, sir.

Q. Didn't you know there was any money there for you at all?

A. No, sir.

Q. A while ago you said that when Mr. Allison took this lease you knew the money was on deposit there and told him so?

A. Yes, sir.

Q. Didn't you?

A. Yes, but you tangled me up there, and you made me tell you something I didn't aim to.

Q. How did I tangle you?

369 A. Well, by cross-questioning.

Q. You understood the question, didn't you?

A. Well, no, not exactly.

Q. Do you mean to tell the court now that you didn't know at the time Allison took this lease that the money was on deposit at the Martinsville Bank for you, and that Gillespie had paid the rental?

A. I ain't going to answer that question.

Q. What is it?

A. I can't answer that question.

Mr. HINDMAN: Why, why don't you answer the question?

A. I have answered it two or three times.

Mr. LOWE:

Q. Then you decline to answer that question this time, do you?

A. Which?

Q. Then you decline to answer that question this time, do you?

A. Yes, sir.

Q. Where was your postoffice address at the time you received these cards?

A. Yale, Illinois; Oblong.

Q. Were they all addressed there?

A. I don't know whether they were, or not

Mr. HINDMAN: We object. The cards will speak for themselves.

The WITNESS: The cards will speak for themselves.

Q. I will ask you to examine Defendants' Exhibit 1 and state where that card was first addressed?

A. It was addressed to Yale, Annapolis, Illinois.

Q. Where is Annapolis, Illinois, from your home?

A. South and east.

Q. How far?

A. About six or seven miles.

Q. In the same county?

A. Yes, sir.

Q. I will ask you now to examine Exhibit 7 of Defendants' Exhibits and state where that card was first addressed?

A. Martinsville, Illinois.

Q. And then forwarded to you?

A. Yes, sir.

Q. And is the same true of Exhibit 1, was it forwarded?

A. Yes, sir.

Q. What was the date of this first Exhibit, Exhibit 1, when you first found it out?

370 A. May 13th.

Q. May 13th of what year?

A. 1907.

Q. That is the first time you knew of it at all?

A. Yes, sir.

Q. Do you remember of going to the bank with some one at Martinsville and getting a check cashed?

A. Yes, sir.

Q. You heard Mr. Sinclair's testimony in June when he stated that you came there and had to go and get someone to come and identify you. Do you remember that?

A. Yes, sir; I remember——

Q. When was that?

A. Well, I didn't take nobody there to identify me.

Q. Never did?

A. No, sir; to get a check cashed. I took this Mr. Brindt there to identify me the day I went after the statement from those cards there at the time.

Q. And is that the first time you went with anybody there?

A. Yes, sir.

Q. Never was there before?

A. That was the first time I was ever there.

Q. Never was in the Bank there at all?

A. No, sir. That was not the first time I was ever there.

Q. I understood you to say it was. When was the first time you was there?

A. Well, I was there sometime before that when I went to see about that rental. The time I took Mr. Solley, or Mr. Brindt there to identify me was the 25th of January, 1908.

Q. How do you know it was that date?

A. Well, because I set it down.

Q. When?

A. At the time.

Q. Set it down? You mean to say to the Master now that on the 8th—25th day of January, 1908, you set down it was that date you went there to examine to see whether there was rentals there for you. Is that what you want to tell him?

A. Yes, sir.

Q. You put it down on that date?

A. Yes, sir.

Q. How did you come to put it down?

A. Well, that is what I went for, for that purpose.

Q. What is it?

A. I went to the bank for the purpose of getting a receipt
371 or statement from the bank and I put down the date for reference.

Q. Anybody tell you to put it down?

A. No, sir.

Q. Have you got the book with you?

A. Yes, sir.

Q. Let me see that; turn to it, please.

(Witness produces book.)

Q. Now, I hand you your book and ask you if that is the place (indicating) where you say you set that down on the 25th of January, A. D. 1908?

A. I didn't set it down.

Q. Didn't you state just now that you did?

A. Yes, sir; I did.

Q. And that was not the case?

Mr. LOWE: Now, I don't want to be severe with you but don't you know that you are on oath and that if you are testifying contrary to what the truth is, you might be indicted for perjury?

Mr. HINDMAN: Now, we object to any such intimidation.

The MASTER: No, no, he probably tries to understand. That isn't a proper question.

Exception by complainants.

The WITNESS: Yes, that is what they are trying to do.

Mr. LOWE: Now, I want you to swear to what is the straight truth, young man, and nothing else.

The MASTER: No, you just pay attention to the questions that he asks you. Anybody is liable to get confused.

Q. Didn't you at about the time of the making of this lease with Allison and M. E. Harris—Isn't that his name, M. E. Harris?

A. Yes, sir.

Q. At your mother's residence there, you and Harris talked in the presence of Allison that the money was on deposit there at Martinsville for these rentals?

A. I don't know whether I did or not.

Q. I want to ask you now if you didn't know at the time this Allison lease was given that E. N. Gillespie, one of the complainants in this case, had deposited in the Exchange Bank at Martinsville rentals due under these leases to your mother and you—to M. A. Walton?

A. I don't remember that far back now.

372 Q. You may have known it and don't remember; is that what you mean to say?

A. Yes, I may have know- it, but I don't remember it now.

Q. Yes. Your statement a while ago that this postal card on May 13, 1907, was the first notice you had is not true; is that correct?

A. Yes, that statement there is correct.

Q. No, I don't mean that. Is that the first knowledge you had of it?

A. Which, of that card?

A. No, sir. Now, I believe you understand me——

Mr. SIMMONS: Let's have the witness understand it now.

Mr. LOWE: Yes, sir; he shall if I can make it clear to him. I have no desire to get the witness——

The WITNESS: Well, I think I have told it straight four or five times, and ain't that enough?

Q. But then you have stated on May 13, 1907, the date of this postal card from the Martinsville bank signed by Fred H. Sinclair, cashier, was the first time you ever knew that Gillespie had deposited any rental there for you?

A. That card (indicating)?

Q. Yes, sir.

A. That was the first I knowed anything about it.

Q. Now, then, don't you know that at the time Allison took this lease, during the time that you was talking of the rental, that you and your mother and Allison and M. E. Harris, at your mother's house, talked of the rentals being paid in at the Exchange bank at Martinsville by E. N. Gillespie on the Walton lease?

A. I don't remember having any conversation of that kind now.

Q. Well, you may answer that by yes, or no, and then you may explain it.

Mr. SIMMONS: Don't proscribe his answer.

The MASTER: Well, he might not be able to answer yes, or no. He can state from his memory whether he had such conversation or not.

Exception by complainants.

Q. What do you say?

Mr. SIMMONS: Judge Lowe is not asking the question now whether he knew about the rentals.

Mr. LOWE: Well, they were discussing them there; he ought to know about it.

373 Mr. SIMMONS: Oh, no, not necessarily.

The MASTER: Now, then, he can ask him whether or not he had a conversation concerning that matter.

The WITNESS: Now, what was it?

(Question read:)

A. I don't remember anything about it.

Q. I will ask you if at the time and before you executed the Allison lease your mother and yourself in the presence of M. E. Walton did not discuss with Allison that E. N. Gillespie had paid the rentals on the Walton lease at the Exchange bank in Martinsville for you and for Susannah Smith, your mother?

A. No, I don't know as I did.

Q. Do you know that you did not?

A. I am pretty positive of it.

Q. Well, now, you can answer one way or the other, seems to me.
(No answer:)

Q. What do you say?

A. I say no.

Q. You say you did not? I will ask you if you did not tell Allison the lessee in the lease you gave him on the premises in controversy in this suit, at the time of the execution of the lease you and Allison did not then and there discuss it, that the rentals had been paid by Gillespie to the Martinsville Exchange Bank for you?

A. I don't remember telling him anything of the kind.

Q. Did you know it at that time?

A. No, sir.

Q. You did not know it?

A. I don't think I did.

Q. Well, if you did know it—I mean, if you didn't know it then, don't you know that you didn't tell Allison?

Mr. HINDMAN: Oh, we object to that; that is argument.

A. Why, if I didn't know it, most positively I didn't tell him.

Q. That is it exactly. Now, that is what I wanted you to say.

Mr. HINDMAN: Certainly.

Q. Now, then do you say you didn't tell Allison at that time?

A. Well, I certainly did not.

374 Q. Well, now, you can answer that by yes or no, if you didn't.

Mr. SIMMONS: Wait.

A. You won't take "no" for an answer.

The MASTER: He says he didn't tell him.

Q. What do you say?

A. What is the question?

(Former answer is referred to:)

Mr. LOWE: Now, then, that may be qualified, that he "certainly did not."

The MASTER: I don't see how you can get a more positive answer.

Mr. LOWE: No, I think it could be much more positive.

The MASTER: Well, ask him another question then.

Q. At the time that Allison executed—you executed this lease to Allison, the lessee, of the land in controversy in this suit, did you know that E. N. Gillespie had deposited money in the Martinsville Exchange Bank to your credit as rental under the Walton lease?

Mr. PARKER: Now, your Honor, we object to that, because he has answered the question two or three times before.

A. I will say "no, sir," to that question.

Q. You did not. Did you testify today that you did know it at that time?

Mr. HINDMAN: Now we object.

The MASTER: No, the record shows what he has testified to.

Mr. LOWE: I want to see if he understood.

The MASTER: Well, the record shows.

Exception by complainants.

The WITNESS: Do you want an answer to that question?

Mr. TROUP: Your attorneys say not.

Mr. LOWE: You said in answer to Mr. Hindman that you had received three or four notices, the first in April 1907. Where is that notice?

A. It is right there on the table by you, unless you have it in your hand.

Q. Well, now, there are four exhibits, and——

A. What did you say the date of that was?

Q. April 1907 is what you testified before he showed you the card. I want you to give me now the one of that date. Now, you said the card was lying on the table; show me; this is all they had, four of them.

375 A. Well, if you want to know if I got one of April 7th, 1907, did you say that?

Q. No.

A. What did you say?

Q. I said you testified that you got three or four notices, the first in April 1907. Now, I want you to give me that notice.

A. Well, I say that I didn't get that notice.

Q. Then you were mistaken when you testified to that; is that true?

A. Yes, sir; I testified through a mistake, if that is what you want to know.

Q. You say your mother got a notice at the same time?

A. I don't know she did.

Q. Didn't you testify she did?

A. I don't remember that she did; I testified that I did, but I didn't say that she did.

Q. I will ask you if Mr. Hindman did not give you Exhibits 2,

3, 4 and 5 and ask you if your mother did not get them at the same time you did yours and you said "Yes."

A. I said I did.

Q. And were you mistaken about that?

A. Well, no, I wasn't mistaken when I said that she received them about the same time that I did mine.

Q. You were mistaken when you answered me just now; is that true?

A. Yes, sir.

Mr. Lowe: That is all, for the present.

Testimony of Ed. McKee.

Mr. ED. MCKEE, a witness called on behalf of the defendant, being first duly sworn, was examined in chief by Mr. Hindman, and testified as follows:

Q. You may state your name.

A. Ed. McKee.

Q. Where do you live, Mr. McKee?

A. About 8 miles south of Casey, Illinois.

Q. How long have you lived there?

A. Lived in that immediate neighborhood all my life, within three or four miles.

376 Q. Have you been engaged in any way in the oil business in that vicinity?

A. To some extent, yes sir.

Q. Are you acquainted with Mr. Willett?

A. Yes, sir.

Q. Did you know him in the year 1906?

A. Yes, sir.

Q. What business were you engaged in then?

A. Well, at that time I was teaming principally, but occasionally I would have an option on an lease and would dabble slightly in them, once in a while would write a lease just for speculation.

Q. Do you know of Mr. Willett buying the Allison lease or the Bowman land out in that vicinity?

A. No, sir.

Q. I don't mean Bowman, I mean the Smith land?

A. Yes, sir.

Q. You may state what connection, if any, you had with the transaction.

A. I drove Mr. Willett for a few days over around the neighborhood, showed him a lease or two. I believe about the second, possibly the third lease we talked about was thirty acres belonging to the widow Smith and 20 acres to John Payne, twenty acres to Mrs. Smith's daughter and twenty acres to Jimmie Smith laying rather in a body together; learned about it; drove him over to Nick Harris' home; we talked to Mr. Harris, as I had been acquainted with him almost all my life and a man by the name of Allison, who didn't know him before, in regard to this lease. They had the leases and these men got on a trade, and I think the next day

possibly a day later I learned that the trade was closed up. At the beginning of the trade they had a price on a bunch of leases and they talked about that for a little while——

Mr. LOWE: Well, now, your Honor, I object; it does not refer to the matter at issue at all.

Mr. HINDMAN: No, it is not responsive to my question, either.

Q. Were you present at the time the negotiations and the deal was closed up at Robinson?

A. Yes, sir. You want it in short form?

Q. Yes.

A. We wanted——

Q. No, no; were you present?

A. Yes, sir.

377 Q. I will ask you if—Well, you may tell what you observed,—what was done there.

A. Well, at this home, Nick Harris', we talked in regard to these leases, or they did, and I done the listening. That was the beginning of the transaction. And Mr. Willett told these parties.

Mr. LOWE: No, no.

Q. No, I expect that wouldn't be competent what they said. Now, let's come to Robinson. Did you take Mr. Willett to Robinson?

A. Yes, sir.

Q. And was the deal closed there?

A. Yes, sir.

Q. And the purchase of the Allison lease by Mr. Willett?

A. Yes, sir.

Q. If any inquiries were made concerning the rental under the former lease, the Walton lease, you may state what you observed and heard in relation to that.

A. Yes, sir; I heard Mr. Willett call over the 'phone for Martinsville, but I cannot state what Bank he called for, but he called for Martinsville from the courthouse, and if I am not mistaken, from the Circuit Clerk's office, and talked to them, but what answer he got, I do not know; but immediately after that they went ahead and closed up the trade.

Q. Well, now, from what you heard, did hear, you may state whether or not the conversation over the 'phone was in relation to rentals at the Martinsville Bank.

A. Yes, sir; that was his purpose going to the 'phone.

Q. And when was that?

A. If I ain't mistaken, it was the latter part of August in 1906?

Q. After the conversation over the 'phone where did you go?

A. We went, if I ain't mistaken, just straight south of the courthouse and upstairs to an attorney's office——

Q. Do you know what attorney's, would you know the name——

A. I would know the name as I would hear it.

Q. McCarthy & Arnold's office?

A. Yes, sir; Arnold is the man. I don't know about the other party.

Q. And there the transaction was closed?

A. Yes, sir.

Mr. HINDMAN: Take the witness.

378 Cross examination by Mr. LOWE:

Q. You say you d-n't know what bank he called?

A. No, sir; I do not.

Q. Is there more than one bank at Martinsville?

A. I am not very much acquainted in Martinsville?

Q. Do you know whether there was or not?

A. No, I do not.

Q. Where do you say you live?

A. I live eight miles south of Casey, Illinois.

Q. Who is your father.

A. Sam McKee, I think he is.

Q. That is the country rumor anyhow?

A. Yes, sir.

Q. How long have you been engaged in the oil business?

A. Why, not to any extent, none of the time, but slightly for something like—Well, possibly since the spring of 1906.

Q. And when was this that you and Mr. Willett went to Robinson?

A. If I mistake not, right about the latter part of August, 1906.

Q. Isn't it possible it was about the 10th of September?

A. I think not. He left some money with me to pay some rentals and paid \$100 location on one of these leases, and I think that come off something near that time, but I may be mistaken.

Q. Have you anything by which you can fix when you were down there?

A. I have my dates all in my memorandum book at home, but I haven't them with me. I am well satisfied—well, I am not exactly satisfied either, but in my own mind I am, it might have been the last day of August, or the first day of September, but it was right there close.

Q. One or the other; that is all you know about it?

A. No, sir.

Q. Do you know anything more?

A. Yes, sir.

Mr. HINDMAN: You may tell it, if you do.

A. Well, I know there at Nick Harris' home when they was talking in regard to these leases the question come up in regard to that old lease, and Mr. Willett told Mr. Allison—

Mr. LOWE: No, no!

The WITNESS: You don't want to hear what I know?

379 Mr. LOWE: I don't want something that is incompetent, that is all. Do you want to tell it?

The WITNESS: I am not particular.

The MASTER: Well, proceed with the examination of the witness.

Mr. LOWE: I am through.

Mr. HINDMAN: I am through.

Testimony of L. E. Willett.

Mr. LOUIS E. WILLETT, one of the defendants called as a witness in his own behalf, being first duly sworn, was examined in chief by Mr. Hindman, and testified as follows:

Q. You may state your name to the court.

A. Louis E. Willett.

Q. Where do you live, Mr. Willett?

A. Buffalo, New York.

Q. Buffalo, New York. And what business are you in?

A. Oil and gas.

Q. In partnership with Mr. Little?

A. Yes, sir.

Q. Of the firm of Little & Willett?

A. Yes, sir.

Q. Did your firm buy the leases that are known as the Allison leases on the Smith land in controversy in this case?

A. Yes, sir.

Q. When did you make that purchase?

A. The deal was closed up on the first day of December—or September 1906.

Q. First day of September?

A. Yes, sir.

Q. Where?

A. At Robinson, Illinois.

Q. Allison was present at the time?

A. He was.

Q. Did you make any investigation at that time to ascertain whether or not any rentals had been paid under that Walton lease?

A. I did.

Q. You may tell the court what investigations you made.

A. I telephoned to the bank at Martinsville, I forget now the name of the Bank, but at any rate it was the bank mentioned in the lease, where the rentals were made payable. I went to Robinson and looked up this lease from the record and then telephoned to the bank to find out if there was any rentals there or the Smiths on these leases, and some one there at the bank told me to wait a moment, and they would see. Shortly after that they came back and told me there were no rentals there, and there never had been.

Q. Now, that was on the first day of September 1906?

A. Yes, sir.

Q. And you may state what the fact is about your having then closed up the deal after you got that information?

A. We went right over to McCarthy & Arnold's office and closed the deal there.

Q. You purchased the Allison lease?

A. I purchased the Allison lease.

Q. What was the consideration paid for those leases, Mr. Willett?

Mr. LOWE: We object to that as not material.

The MASTER: Oh, well, he can testify to it if he wants to. Exception by complainant.

A. Well, it took in more than these leases in question, took in 90 acres.

Q. Yes. What did you pay?

A. Well, \$1,400 for the 90 acres.

Q. What were the developments on these Smith leases at the time you made the purchase?

A. Well, there were no developments on these particular leases.

Q. Did you afterward make some developments?

A. Yes, sir.

Q. Well, what were they?

A. Well, on these leases in question, the first well drilled was the Jimmie Smith well. That was a gas well. That well was completed the 8th day of November, 1906. That is the well—we completed drilling that day; we had some trouble with the well afterward; it blew the tubing out and we had to re-tube.

Q. And what other development?

A. Well, then in February, the latter part of February we started a well on Mrs. Susannah Smith's, and that well was completed, well, it was shot just before the 13th day of March, I have forgotten just what date, but a day or two prior to the 13th day of March that it was shot.

381 Q. March of what year?

A. 1907. And then we built a powerhouse and put up the oil tanks there prior to that. The powerhouse was started along in January, and it was completed some time in February.

Q. February 1907?

A. 1907, yes sir. And it was in operation, oh, nearly a month before this Susannah Smith well was drilled and shot.

Q. And while you had these leases, how many wells and what was the extent of your development and the improvement placed upon the premises?

A. Well, that Susannah Smith was the fourth well we had drilled there, but it was the second well on these leases in question here.

Q. Was that the extent you drilled, the two wells?

A. Well, the two wells and the powerhouse and tanks and that sort of thing and a water well—there was a water well drilled or dug on Mrs. Susannah Smith's.

Q. Where is that power house located?

A. Well, it is located right on the line between Susannah Smith and her daughter, twenty acres. Elzora Smith on the south side of the 30 acres. The tanks and powerhouse was placed right on the line.

Q. On March 9th, 1907, what were there there visible, I mean now on the Smith premises?

A. Well, this gas well on Jimmie Smith's was visible; there was a standard rig on Mrs. Susannah Smith's.

Q. About how high is that standard rig?

A. Well, the regulation height is 72 feet, and I think this was a shorter rig, perhaps 60 feet; and the well drilling—this Susannah Smith well was then drilling; and the powerhouse was completed and all the machinery was in it and running, and the battery of tanks, I think about six tanks, 250-barrel tank. I have forgotten now just the number, but five or six tanks.

Q. Boiler house?

A. Boiler house, about 60 feet and perhaps 18 or 20 feet wide.

Q. Operated with steam?

A. Well, a gas-engine, was run with a gas-engine, but the drilling rig was run with steam.

Mr. HINDMAN: Take the witness.

382 Cross-examination by Mr. LOWE:

Q. You say you are a partner of Mr. Little's?

A. Yes, sir.

Q. What is the name of your firm?

A. Little & Willett.

Q. You bought this at Robinson?

A. Yes, sir—Well, that is where the deal was closed up. Most of the negotiations took place up at Mr. Harris' house, or thereabouts.

Q. Was there any development in that territory at the time you purchased?

A. Well, the Fitch well is the first well drilled in that immediate vicinity. That is the well that created excitement right in that immediate vicinity.

Q. Had the Bowman well been drilled at the time you purchased—when was it drilled?

A. Well, I don't remember now. I don't think it was drilled. I am quite positive there had been no drilling done on the Bowman—I know there had not been when we purchased. The Fitch well was the only producing well in that vicinity.

Q. With whom did you talk in Martinsville, Mr. Willett?

A. Well, sir, I couldn't tell you the man's name.

Q. Did you ask him his name?

A. I may have at the time but I couldn't tell you now.

Q. You don't know that you got the Exchange Bank?

A. Well, I called for the Exchange Bank and asked if it was the Exchange Bank, and asked about these rentals, and they said they would look it up, and came back afterward and told me they had.

Q. What was the name of the other Bank in Martinsville?

A. I don't know the name of any Bank in Martinsville.

Q. Did you know it at that time?

A. Well, I knew it at that time, yes sir; I looked it up in the lease.

Q. No, you don't understand me. The lease wouldn't tell you the names of the Banks at Martinsville, I say, did you know the different banks in Martinsville at that time?

A. No, sir.

Q. Do you want the Master to understand that on that day you

talked with the officers of the Exchange bank of Martinsville, or you made an effort to do that?

A. Yes, sir.

383 Q. Well, now, which is it?

A. Well, I wouldn't say it was the Exchange Bank.

Q. Yes, sir.

A. But the bank that was mentioned in this lease, whatever bank it was.

Q. Well, you know what bank that was, you looked at the lease.

A. Well, I haven't looked at the lease, I guess, in three years. I heard here today it was the Exchange Bank at Martinsville; that is all I know about it.

Q. Do you mean to say that you talked with the Exchange Bank of Martinsville on that day?

A. Yes, sir.

Q. Or that you called for it on the telephone?

A. I called for it and got the bank that I called for.

Q. You could not be mistaken about that?

A. I don't think so. That was quite an important point with me at the time.

Q. You have found out that the telephone will give the wrong parties, haven't you?

A. Yes, sir.

Q. Frequently?

A. Yes, sir.

Q. Although the case may be important. Did you know at that time the names of the officers of the Exchange Bank?

A. Well, Mr. Harris gave me the name of the man at that time and my recollection is that I called for that man. I don't remember now who he was.

Q. Well, did you get the man that you called for?

A. I did.

Q. Then you didn't call for any bank at all, you just called for a man, is that it?

A. I called for the man and called for the bank.

Q. And what did he tell you?

A. Told me to wait a moment and he would see.

A. And then what?

A. Then he come back and said, "No", there was no money on deposit there for Jimmie Smith, or Susannah Smith or Elzora Smith as rentals on their leases, and never had been.

Q. And that is all the effort you made to find out, what you did over the telephone?

A. No, sir.

Q. Well, you may state further.

384 A. Before that I went over to Mrs. Smith's house and talked with her about it—

Q. No, I am asking you now, is that the only effort you made by calling on the bank?

A. Yes, sir; that is the only effort I made personally.

Q. Did you call on Mr. Gillespie, the owner of the lease?

A. No, sir.

Q. At Robinson, at the time, to see if he had paid it?

A. No, sir.

Q. You knew that Gillespie owned the leases, didn't you?

A. I don't think that I knew that Gillespie owned the leases at that time. I think the lease was in some other man's name; had been taken in some other man's name, hadn't it?

Q. Yes; Walton's?

A. I don't think that Mr. Gillespie's name appeared on the records at that time.

Q. Didn't you have the record examined?

A. Well, we didn't go out and search by an abstract, as you call it; we looked over the records ourselves and took the clerk there or someone — the office——

Q. Yes, and they showed you the Walton lease?

A. Yes, sir; and the Wilcox lease.

Q. Yes; and you knew the Wilcox lease had been abandoned?

A. Yes, sir.

Q. That they had drilled a dry hole and abandoned it?

A. Yes, sir.

Q. And then didn't you find and know that this man Walton assigned the lease to Prosser on the back of the lease, and that they were recorded together?

A. Well, possibly at that time—if it was there, I saw it.

Q. Mr. Gillespie's assignment was recorded since that time?

A. Well, now, I don't remember; if it was there I saw it at that time. I saw everything——

Q. Yes, you saw everything that the record showed at that time?

A. Yes sir.

Q. But you did not go to see Mr. Gillespie or anyone for him?

A. No.

Q. The only effort you made to find out about Mr. Gillespie or the owner of the lease or an agent to receive the money was what you did over the telephone?

A. No, sir; I asked if the Smiths had ever——

Q. No, I didn't ask you about the Smiths. I said the agent to receive the money.

A. Well, I don't know that I quite understand your question.

Q. Now, the lease provided that the lessee or the assignee of the lessee could deposit the money at some one place, didn't it?

A. Yes, sir.

Q. And that place mentioned was at the Exchange Bank at Martinsville?

A. Yes, sir.

Q. When it is due under the lease. I asked you if that is the only effort you made to find out either from Gillespie or from the Exchange Bank at Martinsville, is what you did over the telephone?

A. Well, now, I was just trying to explain to you that I had made other efforts to find out whether there had been any rentals paid.

Q. Well, that isn't what I asked you at all.

A. Or whether there had been any rentals placed on deposit at the bank.

Q. I can't help but think, Mr. Willett, that that question is plain. I am asking you if you made any other effort to find out from the bank, except what you did over the telephone.

A. Oh, not from the bank, no.

Q. And Mr. Gillespie, although having an office there in Robinson, you did not go to see him, either?

A. Well, I didn't know Mr. Gillespie at the time and didn't know that he had an office there or anything about it.

Q. Did you make any effort to find out?

A. No, only from the bank.

Q. Did you build your power before you got your well, Mr. Willett?

A. Well, we had some wells; we had wells on the Elzora Smith, and had a well on the John Payne property, before we built the power.

Q. Did this power pump the Payne property?

A. Yes, sir.

Q. And the Elzora Smith property?

A. Yes, sir.

386 Q. And they were each oil wells?

A. Yes, sir.

Q. Paying producers?

A. Well, they are not very heavy wells. I think the Payne well started our 125-barrel and the Elzora Smith, right close to 200 barrel.

Q. Yes. Now, when was it you built the power house?

A. We built the power house—it was completed about the middle of February.

Q. In 1907?

A. 1907, yes, about the middle of February.

Q. And when was it you got your lease?

A. Why, the lease was assigned to us on the first day of September, 1906.

Q. Where was that assignment made?

A. In Robinson.

Q. Have the lease recorded right away?

A. Well, I think not; I think I took the lease home with me.

Q. Do you know when they were recorded?

A. I forget now just when.

Q. When was the first well completed, after you got it?

A. The first well was a gas well, the first well that was completed. We started a well immediately, but we had lots of trouble with it. I think we were three months drilling that well. That was on the John Payne—

Q. No, I am asking you now in regard to this well.

A. Well the gas well was the first well on Jimmie Smith.

Q. And when was that completed?

A. The 8th day of November 1906.

Q. When did you fix that ready to produce gas, or did you block that, shut that in?

A. Well, we shut it in just for the time being and it broke loose, blew out under the casing and then we started to tube it and it blew out and broke the tubing, and when had some trouble with it. It was probably ten days before we got it fixed up to produce.

Q. And then did you use it after that?

A. We used it for drilling, yes.

Q. And when did you commence to use it?

A. Well, I couldn't tell you just exactly now; it was within a couple of weeks.

Q. Then after that you used that well in all your drillings under these two leases?

387 A. Well, there was another well nearly completed then—
Oh, on these two leases?

Q. Yes.

A. Why, we only drilled one more well before we sold the property. We drilled a well on the Susannah Smith, and we used the gas to drill that well from this Jimmie Smith well.

Q. Then you drilled one well on James A. Smith's, which was a gas well?

A. Yes, sir.

Q. And one well on Susannah Smith's, which was an oil well?

A. Yes, sir.

Q. And then you sold?

A. Then we sold.

Q. When did you sell, Mr. Willett?

A. I think we gave a sort of optional contract at first. That was signed on the 13th day of March.

Q. Did you have any object in withholding your lease from record from September until the latter part of January?

A. No, sir; the only object was we interested some other parties in part of this territory with us, and I took the leases home with me to show them to the other parties. If I had left them in Robinson, why of course. I would not have had the leases to show, but I was in a hurry, didn't have time to get copies made and so I took the original leases right home with me and I think we were delayed for some little time before we had them recorded; I don't remember just how long it was. That was our only object.

Mr. LOWE: That is all.

Mr. SIMMONS:

Q. Just one question. Mr. Willett, at the time that this action was instituted, did you hold any mortgage or lien of any kind against this Smith property?

Mr. LOWE: Don't you explain that by your answer?

Mr. SIMMONS: Well, I don't think there is any necessity of affirmatively proving it, but you didn't prove it.

Mr. LOWE: All right; go ahead.

Mr. SIMMONS: I say, I don't think there is any necessity. There won't be any insistence then—?

Mr. LOWE: Why, I think our allegation is that it is paid off but not released of record.

Mr. SIMMONS: Well, then if it is not insisted that we have a mortgage, why, we don't care.

(Question read.)

388 A. We held a mortgage for a time against the property; I don't know when the action was begun.

Q. Well, you may state then whether or not that mortgage has been fully paid and satisfied?

A. It has.

Q. You nor Mr. Little do not hold any mortgage against it?

A. We do not.

Mr. SIMMONS: That is all.

Mr. LOSE:

Q. You say the notes are paid, the incumbrance is all paid?

A. All paid.

Q. Has the mortgage been released of record?

A. I think it has; we made out a release; I don't know whether it has been recorded, or not; I think it has. I am sure Mr. Hennig and the other parties will see that it has been recorded, been released. I know we made out a release.

Q. Well, there has been a release given?

A. Yes, sir.

Mr. LOWE: That is all.

Redirect examination by Mr. HINDMAN:

Q. Did you sell this Smith property to Mr. Hennig? You conducted the negotiation?

A. Well, Mr. Little and I did. We sold it to Mr. Hennig and his associates. I don't know how the title went now.

Q. The negotiations were carried on between yourself and Mr. Hennig?

A. Yes, sir.

Q. Was Mr. Johnson or Solley known in the transaction at the time?

A. Well, not until the assignment was made.

Q. As I understand it, the first step in this transaction was an option that was given to Mr. Hennig?

A. Yes, sir.

Q. Giving him the privilege of purchasing within a definite stated time?

A. Yes, sir.

Q. That was in the name of Mr. Hennig individually, was it?

A. Yes, sir.

Q. Given to him individually?

A. Yes, sir.

389 Q. And about the expiration of the option you closed the deal with Mr. Hennig and Solley and Johnson?

A. Yes, sir.

Q. They became the purchasers of it?

A. Yes, sir.

Q. What was the consideration they paid you?

Mr. LOWE: I object.

The MASTER: Oh, he may answer.

Exception by complainants.

A. Well, this took in the property; it took in 90 acres there.

Q. Well, the 90 acres.

A. The consideration on the 90 acres was fifty thousand dollars.

Q. \$50,000?

A. Yes, sir; and they paid for the last well in addition.

Q. The last well was in process of construction at that time?

A. Yes, sir.

Q. And they paid you in addition to that for the oil in tanks on the premises and in line?

A. Yes, sir.

Q. Part of the consideration was paid in cash and the rest represented by notes secured by a mortgage on the property?

A. Yes, sir.

Q. That you say has been discharged since that time?

A. Yes, sir.

Mr. HINDMAN: That is all.

Recross-examination by Mr. LOWE:

Q. Now, which well do you mean by the last well that was paid for—you mean the one that is built on Susannah Smith?

A. That is the one.

Q. Yes. Then you really didn't pay for the drilling of but one, and that was the gas well on James A. Smith's, on this property in controversy?

A. Well, we paid for this well ourselves, and then they added that to the purchase price; we drilled the well, let the contract, and paid for it, carried out our contract and paid for it, and they added the cost of that well to the purchase price and paid us the money.

Q. Well, then really all you expended was for the gas well on James A. Smith's?

390 Mr. SIMMONS: Well, not, your Honor, he has made it very plain.

A. We paid for it, and they paid us.

Q. Then the only outlay you was out eventually was what the James A. Smith well cost you; is that correct?

A. Oh, no, no; we built a powerhouse there that cost us a good deal of money and we put up oil tanks and we built a water well and made lead lines and one thing and another there, and gas lines, and that sort of thing.

Q. Then how many wells did you drill that you paid for that you didn't get the money back?

Mr. HINDMAN: Oh, now, we object.

A. We made an honest profit—

Q. Well?—

A. We drilled the James Smith well and paid for it in cash, and we drilled the Elzora Smith well—

- Q. Now, that isn't in controversy.
 A. And paid for it in cash.
 Q. That is not in controversy, so you need not refer to that.
 A. Well, on the Susannah Smith, we paid for it in cash.
 Q. And then got your money back?
 A. And then got our money back.
 Q. You got fifty thousand besides what you got for the Susannah Smith well, is that it?
 A. Yes, and the oil in the tanks and in line.
 Q. Yes, that is it. Now, I want to ask you if this assignment was made to Mr. Hennig at all. Didn't you assign it to Solley and Johnson?
 A. I think when the title passed it went to Solley and Johnson that is my recollection.
 Q. Yes, sir. They gave you back the notes and the mortgage and so far as the records disclose, Hennig was not known at all, that it?
 A. Well, sir I don't remember just how those notes were; I have forgotten.
 Q. Well, was the mortgage signed by Hennig?
 A. I think not.
 Q. Well, then, you may answer the question: So far as the record discloses in your transaction about selling these premises in controversy Hennig was not known at all?
 A. It is my recollection that Hennig did not appear.
 Mr. LOWE: That is it exactly. I believe that is all.

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Testimony of C. F. Johnson.

Mr. C. F. JOHNSON, one of the defendants, called as a witness on his own behalf, being first duly sworn, was examined in chief by the attorney for the plaintiff, and testified as follows:

- Q. You may state your name to the court.
 A. C. F. Johnson.
 Q. Where do you live, Mr. Johnson?
 A. I have a residence at Casey, Illinois, and have a business at St. Louis, Missouri.
 Q. Have you any business in Casey, Illinois?
 A. Yes, sir.
 Q. What business, Mr. Johnson?
 A. Banking and lumber business.
 Q. Hold any official position there?
 A. Where?
 Q. At Casey.
 A. What kind of official position?
 Q. Yes. Were you Mayor of the City?
 A. Yes, sir, at that time.
 Q. Are you mayor at the present time?
 A. I declined the honor.

Q. Do you know a person or did you ever know a person by the name of Art L. Prosser?

A. Not that I remember.

Q. I will ask you if on or about March 15, 1907, or any other time you had a conversation with Mr. Prosser in which he informed you that Mr. Gillespie had a lease on the Smith property which he intended to enforce, or anything to that effect?

A. No, sir.

Q. Did you ever have any conversation with Mr. Prosser in relation to any lease on the Smith farm?

A. Not that I know of.

Q. Are you a member of the firm of Solley & Johnson that purchased these Smith leases?

A. Yes, sir.

Q. On March 15th, I will ask you if you were about Casey at that time?

A. If I were about there?

Q. Yes.

A. I was there on Sundays. About that time I had business at Sheldon, Indiana, still have, and during those weeks I was at Casey but very little, except Saturdays and Sundays—Saturday afternoons and Sundays.

Q. When did you first hear of the Smith leases or take any steps toward the purchase of them?

A. My recollection is something about the 20th of March 1907.

Q. Twentieth of March?

A. Yes, sir.

Q. With whom did you conduct those negotiations?

A. With Mr. Solley and Mr. Hennig.

Q. I wish you would explain the whole transaction of the purchase of whose leases and your connection with them, and what knowledge you had, if any, of any prior lease on the premises at the time you purchased them?

A. I had no knowledge of any prior lease. Mr. Hennig came to me with the property showing the leases and other leases around them and he asked me to become interested with him and with Mr. Solley, and said that he wanted me to raise money—

Mr. LOWE: Now, I object.

Mr. HINDMAN: No, I expect the conversation, any conversations you had between yourself and Mr. Hennig—

The WITNESS: Well, I am telling you what Mr. Hennig asked me.

Mr. HINDMAN: Well, that wouldn't be competent.

The WITNESS: Well, ask your questions and I will answer them.

Q. Well, I was simply wanting you to give your connection with the case.

A. I am giving it. He came to me and asked me to become associated with him—

Q. Go on and tell just what occurred.

A. And I told him I might be interested—

Mr. LOWE: No, I object.

Q. No, it would not be competent to tell what you said and what he said; but tell what was done.

A. I bought a one-fourth interest in the leases.

Q. When was that?

A. My recollection is the 28th of March.

Q. 28th of when?

A. Twenty-eighth.

Q. 28th of March?

A. 1907, about a week after he came to me.

Q. You bought them of Mr. Hennig?

393 A. No, sir; Mr. Hennig had an option on the property and on that option he and Mr. Solley and myself, bought the leases on that option; I furnished the money for my fourth and Mr. Hennig's fourth, and Mr. Solley furnished the money for one-half of the first payment.

Q. And the assignment then was made from Little & Walton to—

A. Solley and Johnson. I held Mr. Hennig's interest in the property until he paid me the one-fourth interest that I had invested in him, at which time I deeded it back to him.

Q. Now, then I will ask you, Mr. Johnson, if at the time of the purchase of these leases you had any knowledge whatever of the Walton—the existence of the Walton leases?

A. No, sir.

Q. What, if anything, was done or did you do or have done regard to looking up the title?

A. Mr. Hennig conducted the business of looking up the title and making the examination.

Q. That is the part of the business that Mr. Hennig did?

A. Yes, sir.

Q. What was the consideration you paid?

A. \$50,000 for 90 acres of which these leases in question were a part.

Q. And the whole of the consideration has been paid?

A. Yes, sir.

Q. And in addition to that you have made lasting and valuable improvements upon the premises?

A. Yes, sir.

Q. You have put down how many wells since that?

A. I am not prepared to say, because that is not my part of the business. Mr. Hennig looks after that.

Q. Oh, Mr. Hennig is the active oil man?

A. Yes, sir; I was in the banking business in Casey and he came to me with the proposition.

Q. Is there anything else in reference to this case that you know of that you care to make any statement about?

A. In what regard?

Q. In regard to anything; if there is anything you desire to state or any explanations you desire to make, you may do so.

A. That is all I think of right now.

Q. Were you ever served with any notice by Mr. Gillespie?

394 A. When the suit was brought to me? When the suit was brought?

Q. No, before.

A. Not that I know of.

Q. The only notice you received from Gillespie or anyone associated with him—

Mr. LOWE: Now, I object; he says not that he knows of. Let him tell.

The MASTER: Well, ask the question and then don't you answer until they finish.

(Question read.)

Q. Or any one claiming under the Walton lease was the process served on you at the bringing of the suit?

Mr. LOWE: Now, to that we object, your Honor. He just said that he didn't get any that he knew of, and then he goes on and suggests something else, and I object to the suggestion and answer.

The MASTER: Well, he may answer.

Exception by complainants.

Mr. HINDMAN: There is a question unanswered, Mr. Johnson. Will you please answer the question?

A. May I answer that question?

Q. Yes, sir.

A. I say did I not answer it?

Q. Well, I don't know if you did.

A. The only notice I ever received to the best of my knowledge and belief was the service when the suit was brought.

Mr. HINDMAN: That is all.

Cross-examination by Mr. LOWE:

Q. You say you were Mayor or Casey?

A. Yes, sir; I had that honor at the time.

Q. At what time?

A. When this action was brought.

Q. Now, do you mean to say you would be mayor of a city and then not—would be away all the time and not attend to that office?

A. That is not material to this case.

Q. Well, what do you say about that?

A. How?

395 Q. What do you say about that? You said you were away all the time. I am trying—

A. I said I was most of the time at that period.

Q. That you *was* away most of the time during the period of the mayoralty, or of the buying of this lease?

A. We will say about two or three months there that at the time I was away more or less of the time.

Q. Yes, but were home occasionally?

A. Yes, sir.

Q. Do I understand you to say that you don't know R. L. Prosser?

A. Do what—don't know Prosser?

Q. Yes, that is what I said?

A. Not that I remember of.

Q. You don't say then that you and Prosser did not have a conversation in Casey about the 25th of March, 1907, in which he suggested to you—or told you that Gillespie owned these leases?

A. I say I did not have any conversation with Mr. Prosser regarding these leases in any way.

Q. Do you know where the telephone office is at Casey?

A. I certainly do.

Q. Did you ever meet Mr. Prosser there?

A. I answered that question.

Mr. LOWE: Your Honor, I ask him to answer the question.

The MASTER: Answer the question.

(Question read.)

A. I did not, not that I know of.

Q. You say you didn't know anything of the Gillespie leases at the time you purchased the assignment from——

A. That is what I said, yes, sir.

Mr. LOWE: Are these questions offensive to you?

The WITNESS: No, sir.

Mr. LOWE: Well, your answer indicates it.

The WITNESS: I did not mean anything offensive, sir.

Mr. LOWE: Well, I am glad that is true, because I am certain I don't want to offend you.

A. Not in the least. I didn't mean any offense at all.

Q. Did you examine the title at the time the assignment was made from Little & Willett?

A. Did I examine it?

Q. Yes, sir.

A. My recollection is that Mr. Hennig read it.

396 Q. Do you remember in there that they stated to you folks that they would guarantee the title?

A. How is that?

Q. Do you remember that in that assignment they stated to your folks that they would guarantee the title?

A. That is my recollection that that was read.

Q. Why did you want that inserted, Mr. Johnson.

A. Because if you buy a piece of property would you not want the title warranted?

Q. That isn't the way this reads, if I remember it correctly. Do you mean to say that the Walton leases and Wilcox leases were not discussed at the time you made this purchase?

A. Not with me, no sir.

Q. Didn't you know anything about them?

A. Left the matter with Mr. Hennig.

Q. Mr. Hennig knew about them?

A. I can't say what Mr. Hennig knew.

Q. You and he did not discuss the matter?

A. He said the title to the property would be all right. He would have it examined by an attorney who was competent.

Q. Did he tell you he had had an abstract made at one time?

A. I can't say that he said those exact words.

Mr. HINDMAN: No, the question is did he tell you that he had an abstract made?

A. That he had an abstract?

Mr. HINDMAN: Yes.

A. Why certainly; he said he had an abstract made, and *and* the title examined by an attorney.

Mr. LOWE:

Q. Why couldn't you have told me that before Mr. Hindman suggested it to you?

Mr. HINDMAN: He misunderstood the question.

Mr. LOWE: Oh, I don't see how he could misunderstand such a question as that.

Q. I will ask you if Mr. Hennig did not have the title examined, did not have an abstract made and the title examined and the Walton leases left off the abstract? Don't you know that to be the case?

A. I do not.

Q. And that W. B. Scholfield, now Judge of this Circuit, told him that there was some litigation about this matter and that he could not have this—that he could not pass on the title until that was put on.

7 A. Never heard tell of anything like that.

Q. That is new to you?

A. Yes, sir. I certainly would not have risked my money or anything of that kind, not only putting my money in but going security for another man.

Q. Well, the Walton lease was recorded at the time you made this purchase, you understand?

A. Well, I have heard of a great many leases that have been recorded but they are of no value.

Q. Then you knew of this at the time but it was of no value?

A. No, sir; I did not. I just cited the fact. I left the proving the title to Mr. Hennig.

Q. Now, then, I will repeat the question: At the time you made this purchase, the Walton lease was of record in Crawford County, Illinois, where the land is situated?

A. I don't know, no sir.

Q. Didn't you know now whether the Walton lease was recorded at the time you made this purchase?

A. That was not my part of the trade.

Q. No, now you don't answer the question, and I insist that you do that.

The WITNESS: Well, read it.

(Question is read.)

A. I did not.

Q. Did you know whether there was a Walton lease ever given or not by—

A. I did not.

Q. You just simply purchased because Hennig told you it was all right?

A. Mr. Hennig and I had had some business relations before, and he attended to his part of it and I attended to my part of it. If he came to me with an investment and I made the investment on his recommendation and our attorney.

Q. Who represented you?

A. My recollection is that Scholfield examined the title.

Q. Will you give his first name.

A. How?

Q. Will you give his first name?

A. Well, I think it was Golden, Scholfield & Booth.

Q. Where are they located?

A. They are located at Marshal Illinois.

Q. And that was in March 1907?

398 A. As near as I remember it.

Q. Well, is there any way you can be absolutely certain about it?

A. Well, my recollection is that the notes were made on March 28th, 27th or 28th, 1906.

Q. And at that time Golden, Scholfield & Booth were your attorneys?

A. How?

Q. And at that time Golden, Scholfield & Booth were your attorneys?

A. I said my recollection was that they examined the title.

Q. Do you know T. M. Barnsdale of Pittsburgh?

A. I do not.

Q. Did you ever have any transaction, business transaction with him or with his agent, business representative?

A. What kind of business transaction?

Q. Any kind.

A. You mean about this property?

Q. Yes, if you desire to limit it to this?

A. Not regarding this property that I know of.

Q. I will ask you if you did not talk to R. L. Prosser in Casey, Illinois, before you purchased this property and stated to him that T. N. Barnsdale was going in with you and buy this property?

A. Going in with me? Did you ask me if T. N. Barnsdale was going in with me to buy this property?

(Question read:)

A. I certainly did not. I never saw Mr. Barnsdale in my life, and never spoke to him.

Q. And never intended going in business with him?

A. No, sir.

Q. Never talked to anybody about going in with him?

A. No, sir; I did not. Why would I want to talk about going in with a man I never saw.

Mr. LOWE: That is all.

Adjourned till 9 o'clock Wednesday morning, August 18, 1909.

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WEDNESDAY MORNING, August 18, 1909.

Testimony of W. Hennig.

Mr. WALTER HENNIG, one of the defendants, being first duly sworn, was examined in chief by Mr. Hindman, and testified as follows:

Q. Your name is Walter Hennig?

A. Yes, sir.

Q. One of the defendants in this case?

A. Yes, sir.

Q. You are interested in the lease on the Smith property in controversy in this case?

A. Yes, sir.

Q. I wish you would tell in your own way in narrative form and without questioning your relation with that case or with that lease from your first knowledge of it until the present time.

A. Well, you want me to tell about how I became interested in the lease?

Q. Yes.

A. Well, I was interested in about 700 acres of leases that surrounded this land that I had bought the year previous and was operating. These leases lay right in the centre of the leases that I was operating, and I, of course, wanted to buy them, and I made overtures to Mr. Little and Willett, who owned the leases, to buy them; and finally in March 1907 I made an agreement to buy the leases from them. I took an option to buy the leases on the 13th day of March. My intention was of course to buy the leases for the people with whom I was interested in the other property, the Fulton Oil and Gas Company. You can see that to have the entire tract operated by one company it could be done more economically. But the Fulton people thought I was paying too much money for the property and I tried to convince them by letters and telegrams and telephone messages that it was a bargain situated such as it was.

Mr. LOWE: Well, now, your Honor, I object to this; it is encumbering the record.

Mr. HINDMAN: Well, I think the point he is driving at is near at hand. Go on, Mr. Hennig.

A. Well, my option extended only for a period of fifteen days, and I used all the means of persuasion I could with the Fulton people to try to get them to buy it, but they finally decided it was too high a price, and then I put the matter before Mr. Solley and Mr. Johnson

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Q. Now about when was it that you suggested that thing to Solley and Johnson?

A. Well, I could not state the exact day, but it was after the 13th day of March and before the 28th day of March.

Q. Which one, Solley or Johnson, was it, that you began the negotiations with?

A. Mr. Solley.

Q. Solley? Did you know Mr. Johnson was in that vicinity at that time?

A. No, I didn't know——

Q. Didn't know whether he was there or not. Very well. Now, these leases that you are speaking about were the Allison——

A. Yes, sir.

Q. —leases on the Smith land?

A. Yes, sir.

Q. Because of an objection that is made to the form of the question you may state what the fact it as to whether or not the leases in controversy were the Allison leases.

Mr. LOWE: Now, I object to that, your Honor. I wanted him to ask what leases in controversy and let him tell.

The MASTER: Oh, go ahead and answer it. I didn't suppose there was any question about that.

Exception by complainants.

A. Well, they were the Allison leases, yes sir.

Q. Did you have any knowledge, Mr. Hennig, at that time of any other leases on the Smith land?

A. None whatever.

Q. Did you have any knowledge of there having been a lease taken on this land and surrendered——operated?

A. Not at the time I took the option. Will I go on?

Q. Yes.

A. After I took the option I instructed my attorney to have an abstract of the title to the property made. Do you want me to tell why?

Q. Well, just tell what you did.

A. Well, I instructed my attorney to prepare an abstract to the title of the property, which he did. After it was prepared I submitted it to him for an opinion on it, and afterward submitted it to W. B. Scholfield of Marshal, who also O. K'd the abstract; and then I bought the property.

401 Q. At the time you bought the property had there been any developments on it?

A. Yes, sir.

Q. What development?

A. There was a gas well built on the James A. Smith property.

Q. By whom?

A. By Little & Willett.

Q. Oh, yes——

A. And an oil well drilled on the Susannah Smith property by

Little & Willett. And a power house built, a boiler-house, boiler, tankage pipelines and lead lines, and all the necessary appliances to operate it.

Q. What knowledge, if any, did you have of the Walton lease at the time you made the purchase of this Allison lease?

A. I had no knowledge whatever.

Q. What was the consideration you paid for these leases?

A. Well, we paid \$50,000 for 90 acres. There was 40 acres of leases owned by Mr. Little and Willett that is not in controversy. There were 90 acres we paid \$50,000 for.

Q. Was that all paid in cash?

A. No, sir.

Q. How was it paid?

A. We paid \$30,000 in cash, and executed five notes for \$4,000 each with a mortgage on the property as security.

Q. Has that mortgage since been paid?

A. Yes, sir.

Q. And what developments have been made on the property since you got a hold of it?

A. Well, we drilled five wells on the Susannah Smith and five wells on the James A. Smith, ten wells in all.

Q. Ten wells that you people have drilled?

A. Yes, sir.

Q. Making in all how many wells on the two pieces of property in controversy?

A. Twelve wells, I think.

Q. And you may state what the equipment is on the premises aside from the wells.

A. Well, it is the usual equipment, with a lease, you know. Of course, the powerhouse and boiler house were installed on the property when we bought it. We have laid the necessary lead
402 lines and pole-rod lines and erected some additional tankage and drilled wells.

Q. When did you complete your first well, Mr. Hennig?

A. Well, I cannot state absolutely, Mr. Hindman, but it was right immediately after we bought the property. We started drilling right away.

Q. At the time you bought this property, did you have any knowledge of the Wilcox lease?

A. No, sir—I want to qualify that. At the time I bought it I did then, because the abstract showed it. At the time I took the option I did not know there had ever been a lease on the property.

Q. The abstract that you obtained did not disclose the Walton lease?

A. No, sir.

Q. Who prepared or had the abstractor to prepare the abstract?

A. My attorney, George W. Jones, of Robinson.

Q. You may state whether or not you had any personal connection with the preparation of the abstract?

A. Oh, none whatever.

Q. When did you first discover that there was a Walton lease or what is known as the Walton lease on this land?

A. Well, sometime early in August, 1907?

Q. And how did you discover it?

A. Well, sir, I wanted to borrow some money on that property as security and I made application to the Ohio Oil Company to loan me the money and they told me they would do so if the title was all right and instructed me to submit my papers to W. B. Scholfield at Marshall, who was their attorney; and of course I thought I had the money, because Mr. Scholfield had passed on the property when I bought it. So I took my lease, assignments and my abstract over to Mr. Scholfield and submitted them to him and he told me there had been a suit filed against us for possession of the property.

Q. That is this present suit?

A. This present suit.

Q. And that was commenced over in the State court?

A. Yes, sir.

Q. And dismissed there and filed in this court?

A. Yes, sir.

Q. Had you at that time been served with any process in this suit.

403 A. No, sir.

Q. Mr. Scholfield at that time was a practicing attorney?

A. Yes, sir.

Q. And was one of the attorneys for the complainants, afterward was he not?

A. Yes, sir.

Q. Can you tell the court how much money you had expended upon the premises there in the way of development and improvement?

A. Well, roughly speaking—

Mr. LOWE: Just a moment, your Honor. That certainly cannot have any bearing on this matter now and we object because it is wholly immaterial.

The MASTER: Well, I will hear what he has to say about it. Exception by complainants.

A. Wells in that vicinity we figured cost about \$1500 a piece complete.

Mr. LOWE: Now I object, your Honor—not what they figured, what did these wells cost?

The MASTER: That is right, tell about what these wells cost.

A. These wells cost about \$1500 complete and hung on the power.

Q. Was that the extent of the improvement, expense placed upon the premises?

A. Well, there would be the ordinary expense of operating the lease, wages and labor bill, teaming bills, and so on.

Q. The power, I believe you said, was on there?

A. Yes, sir.

Q. And purchased with the property?

A. Yes, sir.

Mr. HINDMAN: Take the witness.

Cross-examination by Mr. LOWE:

Q. Who did you say represented you at Robinson?

A. George W. Jones.

Q. Does he still represent you?

A. No, sir.

Q. Is this the only case he ever represented you in?

A. No, sir.

Q. Was there any misunderstanding between you and Mr. Jones about the abstract?

404 A. None whatever, sir.

Q. You did not have anything to do with the preparation.

Who did prepare it?

A. Well, you mean——

Q. I say you said he did not have anything to do with the preparation of it?

A. No, sir.

Q. Who did prepare it?

A. The names of Siler and Macomb—I paid the bill to Siler and Macomb, but I did not have any conversation with them about——

Q. Well, what I am asking now is I am asking what abstractor or abstractors made the abstract?

A. Siler and Macomb.

Q. They were in Mr. Jones' office at the time, were they not?

A. I think they were, yes sir.

Q. You say you did not know anything about the Walton lease at the time you purchased?

A. No, sir.

Q. Never heard it discussed?

A. No, sir.

Q. What other leases did you own? You said you owned all the leases around this consisting of about 700 acres, and this was in the centre of it?

A. Yes, sir.

Q. What were the other leases?

A. Well, there was the John Payne, 40 acres; and the Daniel O. Blin—the John Payne, 80 acres, S. M. Payne, or Melville Payne, the Ford Bowman.

Q. What Bowman?

A. Ford Bowman,—S. C. Bowman, I believe.

Q. Oh, yes, had there been any other leases on this land at the time you purchased the 700 acres you speak of?

A. There had been a lease on the Bowman land, yes sir.

Q. And at the time you purchased this land in controversy was that lease on it at that time?

A. Yes, sir.

Q. The lease that you were having litigation about then?

Mr. PARKER: We object to that as not cross-examination.

The MASTER: It isn't cross-examination. I don't care what occurred on this 700 acres not in controversy here.

Mr. LOWE: Does the court hold the question as incompetent?

405 The MASTER: Yes, sir.
Exception by complainants.

Q. Did I understand you to say the matter was in controversy at the time when you purchased?

A. Yes, sir.

Q. When did you get this assignment?

A. On the 28th day of March.

Q. To whom was that made?

A. To Solley and Johnson.

Q. Your name was not mentioned?

A. No, sir.

Q. You were not served with process or made a defendant in the original case, were you, this case?

A. Yes, sir.

Q. Didn't you come in and ask to be made a defendant afterward?

A. No, sir.

Q. When did you get your assignment, Mr. Hennig?

A. I can't give you the exact date, Judge, but it was about 13 or 14 months after the original assignment.

Q. And was it recorded as soon as you got it?

A. Well, I couldn't say to that; I presume it was.

Q. Has it ever been recorded?

A. Well, I couldn't say to that; that matter is left with my book-keeper at Robinson; I presume it has been.

Q. Have you got the assignment here?

A. No, sir.

Q. Where is it now, Mr. Hennig?

A. I presume it is in Robinson, at the office.

Q. Do you know,—do you know where it is?

A. No, sir; I don't know. No reason to think what it is there.

Q. At the time this suit was brought in the State Court who represented you, Mr. Hennig, what lawyer?

A. George W. Jones.

Q. Isn't it true that at the time this suit was brought, or about that time, that George Jones came, representing you, and asked that you be made a defendant to this suit?

A. You mean in Robinson?

Q. Yes, sir.

A. Why, I don't know; I presume so; if the record shows so, it must be so.

Q. Well, what is your memory about that?

A. I don't remember anything about it, sir.

406 Q. Don't know.

A. No, sir.

Q. Don't you know whether or not your assignment has ever been recorded?

A. No, sir; I couldn't say, Judge.

Q. Did the abstractors ever try to explain to you why they left the Walton lease off?

A. I never talked with the——

Mr. SIMMONS: Oh, I object to that.

Q. Well, what did Mr. Scholfield say when you asked him about it? He said he first insisted the title was good and then when he went back to borrow money he told you it was not good because of the Walton lease?

A. No, I didn't say that, Judge.

Q. Well, I understood you to say that—when you came back Mr. Scholfield——

A. Mr. Scholfield told me there had been a suit filed against us for possession of the property and therefore he could not pass the title as being good.

Q. Did you and Mr. Scholfield discuss the proposition then and there as to whether or not this lease, the Walton lease, was on the abstract?

A. Oh, no.

Q. Did you say anything to Mr. Scholfield there about it when he passed on the abstract before he said it was good?

Mr. PARKER: We object to the question.

The MASTER: Well, let him tell it. I don't think it is competent, but go ahead.

Exception by defendant.

The WITNESS: Go ahead?

Q. Yes, sir.

A. When I talked to Mr. Scholfield, when he told me there had been a suit filed against us on this property, I tried to persuade him that he was mistaken. I was so absolutely certain that there could not be anything wrong with the title because he had had the abstract, and he had passed on the abstract, and I says, "Why, Mr. Scholfield, you are certainly mistaken. It must be a suit against some other people." And he says, "No, my recollection is that it is this same property, because I remember the name, J. W. Solley and Susannah Smith; I remember those especially." I says, "On what grounds would they bring a suit". Well" he says, "I don't
407 know for sure, Mr. Hennig. The papers—the bill was prepared in Pittsburgh and forwarded to me and I sent it down to Robinson to be filed." But he says, "I will write down and find out what the bill discloses." And I went back to Casey, and in a day or two afterward, I went over there, and he told me it had been filed by E. N. Gillespie, trustee, I believe, claiming to hold under a previous lease. That is the first I ever knew there had been a previous lease.

Q. Let me ask you if you are not mistaken. Did not Mr. Scholfield, right while you were there, go to the 'phone, and call up the attorneys at Robinson and ask if that was not true?

A. I don't think so.

Q. Now, you learned then that there was a suit pending and on

this Walton lease. Is that correct, from that conversation with Scholfield?

A. I learned there was a suit pending, yes sir.

Q. Did you get your loan with the Ohio Oil Company then?

A. No, sir.

Q. He could not pass the title as being good enough to make the loan with this suit pending?

Mr. HINDMAN: Now, we object.

The MASTER: I can't see what difference that makes—notice after the suit was brought. I doubt very much whether a conversation with a plaintiff's attorney—

Mr. LOWE: Well, what we are trying to do, your Honor, is to show this, and we will do it by refreshing his memory when we get to the point, by showing—

The MASTER: Well, what difference does it make whether he got the loan from the Ohio people?

Mr. LOWE: Only to explain that and bring it fresh to his mind. I want to show further by him—

Q. Did you ever go to the Abstractor's in Robinson and inquire why they did not put the Walton lease on this abstract before you purchased this property?

A. No, sir, I think not.

Q. Do you know where that abstract is, Mr. Hennig?

A. Yes, sir.

Q. Where is it?

A. Mr. Parker has it.

Q. Here now, is it?

A. Yes, sir.

408 Q. What is the date of it?

A. Well, I can't say the exact date; it was sometime between the 13th of March and the 28th of March.

Q. Will you let us have that abstract?

A. I think so.

Mr. LOWE: Gentlemen, we ask you for the abstract.
(Mr. Parker hands abstract to Mr. Lowe:)

Q. Has that Walton lease ever been put on since?

A. No, sir.

Q. (reading): "The twenty-fifth day of March, 1907." Now when was it you saw Mr. Scholfield?

A. In August—about that—

Q. About the loan you were speaking of?

A. In August, 1907.

Q. Have you learned since you purchased the premises that the Walton lease was recorded at the time you purchased?

A. Yes, sir.

Q. And the assignment from Walton to Prosser and from Prosser to Gillespie were all recorded at that time?

A. Yes, sir.

Q. You spoke of taking this matter up with the Fulton Oil and

Gas Company. Is that the time you had the conference with Mr. Barnsdale about this purchase?

A. I didn't have any conference with Mr. Barnsdale about this purchase.

Q. Is Mr. Barnsdale interested in the Fulton Oil and Gas Company?

A. Yes, sir; he is a stockholder.

Q. Did you ever take that matter up with him?

A. No, sir.

Q. He is not the party with whom you talked?

A. No, sir.

Q. Well, did you talk with his personal representative about it?

A. No, sir.

Q. Mr. Barnsdale did not know anything about your trying to purchase this lease?

A. Yes, sir; he did.

Q. Will you state how?

A. Yes, sir.

Q. Do it.

A. I was dealing with Mr. F. L. Bartlett of New York, who is President of the Ohio Oil and Gas Company and Mr. F. L.—he is treasurer, and the last telegram that I got from them, when they definitely decided not to buy the property stated that Mr. Barnsdale thought the price was too high. That is all the connection that I know Mr. Barnesdale had with the deal at all.

Q. How did you learn that the Wilcox lease was on the land before you purchased, closed the option?

A. The abstract shows it.

Q. Let me see. You said you took that abstract to your attorney and had him examine it and then took it to Mr. Scholfield?

A. Yes, sir.

Q. How did you come to have two attorneys examine it; what was the occasion for that?

A. Well, Judge, I am to tell it?

The MASTER: Yes, sir.

A. I was in a lawsuit at this time with E. N. Gillespie over the possession of property, and I didn't want any more lawsuits; I am not very well pleased with the lawsuit business and I wanted to be doubly sure; and after Mr. Jones had passed on the title of this abstract, I wanted the additional assurance and I took it to Mr. Scholfield and asked him to pass on it. That was the reason.

Q. What did Mr. Jones say when you told him the Walton lease had been left off the abstract?

A. I don't know that I told Mr. Jones that. I think it was Mr. Jones told me that.

Q. Well, you say you never discussed the matter with any one how that came to be left off?

A. I did with Mr. Jones.

Q. And did he know how that was?

A. Why, of course, he didn't. I don't suppose he knew. I said it certainly must be a mistake.

Q. You mean a mistake that the lease was given or left out? What was the mistake?

A. Why, I suppose the mistake that the Walton lease did not show on the abstract.

Q. Yes, Well, the abstract would speak for that.

A. That's the reason I didn't think there was any Walton lease because the abstract did not show it.

Q. Why didn't you borrow the money from the Ohio Oil Company on this lease?

410 Mr. HINDMAN: Now, certainly that is not competent.

Mr. LOWE: Well, I don't know why you want to bring it out then.

Mr. HINDMAN: We didn't bring it out.

Mr. LOWE: Why he said he tried to borrow the money from the Ohio Oil Company and took his abstract to W. B. Scholfield.

The MASTER: Well, what difference does it make whether he borrowed any money or not?

Mr. LOWE: Well, I don't know whether it does or not. I am trying to find out what difference it makes. I want to show that he did not get it there, that he got it some place else.

The MASTER: Well, you can ask him if he borrowed it any place else.

Q. Did you borrow the money any place else?

Mr. HINDMAN: We object.

The MASTER: You can ask him if he borrowed it any place else. Exception by defendants.

A. Well, Judge, I have always been able to borrow money whenever—

Q. Now, I just asked you this question, Mr. Hennig. You must answer that, is you please.

A. All right.

Q. Did you borrow money of any one else on this land?

A. No, sir.

Q. Or the lease that you had on the land?

A. No, sir.

Q. You just now stated you and Mr. Gillespie were in a lawsuit. You may just tell how that lawsuit came out against you.

Mr. HINDMAN: We object to the question.

The MASTER: Objection sustained. I don't care what happens in another lawsuit. This one is enough for me.

Exception by complainants.

Q. When did you drill the first well, Mr. Hennig, on this property?

A. Well, from recollection, I would say it was in April 1907.

Q. And when did you first learn of this Walton lease?

A. In August, 1907?

Q. What time in August?

411 A. I cannot say the exact date, Judge.

Q. And the first information or first knowledge you had at all was when Scholfield told you?

A. Yes, sir.

Q. Then your assignment, I assume, was not recorded at that time or you would have been made a defendant?

A. I didn't have any assignment at that time.

Q. At that time you didn't have any at all?

A. No, sir.

Q. Did you know anything of the Allison lease when you purchased—had you examined it?

A. No, sir.

Q. You didn't know there was an Allison lease when you purchased this assignment from Little & Willett?

A. Oh, I purchased the Allison lease?

Q. Yes. Well, now, before you made that purchase, did you know anything of the Wilcox lease or leases?

A. No, sir—Judge, I want to change that a little.

Q. I would think so.

A. Yes, sir. I knew when I got the abstract, two days or three before I made the purchase.

Q. I will ask you if the Wilcox lease does not say that they protect any old lease on the land.

Mr. HINDMAN: Oh, we object to that.

The MASTER: Oh, the lease will show for itself.

Mr. LOWE: I want to call his attention to it, if he did know it and that will refer back to the lease.

The MASTER: Well, it doesn't make any difference. The Wilcox lease was on record.

Mr. LOWE: Well, your Honor, I don't desire to annoy the court, but here: He has testified that he did not know anything about the Walton lease, and if we bring knowledge to his mind, the fact to his mind, or tract it back and show what he really found to exist at the time, that he knew of these facts, it would certainly have something to do with his testimony in the matter.

The MASTER: Well, go ahead and ask it. I don't think it has any bearing on the case. If he read the lease, you may ask him.

Exception by defendants.

Q. You know the Wilcox lease?

A. When I got the abstract, yes sir.

Q. Well, you got the abstract before you purchased, did you not?

412 A. Yes, sir.

Q. And the Wilcox lease stated that they agreed in that to protect any old lease, did they not, or former lease, or prior lease—spoke of some other lease on the land; isn't that true?

A. I believe so.

Q. Then after you got that, did you follow it up to see what the old lease was?

A. The abstract did not disclose there was any lease.

Q. No, I am not asking you—I am asking you if you searched the record, or your attorney's to see what that lease was?

A. No, sir; I thought that abstract was an abstract of the record, supposed it was.

Q. That isn't what I am trying to find out. I am trying to ask you this question; After you was advised by the Wilcox lease that there was some oil lease, some prior lease on the premises, now, I am asking you if you or your attorney examined the record, or asked anybody—or the Smiths who gave the lease—what that lease was.

A. The Wilcox lease does not say there was an old lease on there, does it?

Q. I think it does.

A. I don't think it does.

Q. I think it does; it says "protect any old lease."

A. I don't say there was any there.

Q. Well, I will not argue that question. I am stating what it says. Then you did not afterward—after getting the Wilcox lease, did not go personally or your attorney and search the record to see what that was?

A. No, sir.

Q. Did you ask the Smith's if they had given any other lease on that?

A. Not at that time, no, sir.

Q. You say there are twelve wells all told on the two Smiths' tracts, the 20 and the thirty?

A. Yes, sir.

Q. You drilled the first one? You estimated or guessed, about April 1907?

A. Yes, sir.

Q. That would be the third well on the two leases?

A. Yes, sir.

Q. And when did you drill the last one?

413 A. Well, I can't tell you, Judge; we drilled the wells pretty fast, I know that.

Q. Is there a well being drilled there now?

A. Yes, sir.

Q. Who is doing that?

A. We are,—Solley and Johnson.

Q. When did you begin that well?

A. About three weeks ago.

Q. Is that one of the twelve you speak about?

A. No, sir.

Q. That would make then thirteen all told?

A. Yes, sir.

Q. In discussing these matters with the Smiths before you purchased, what did they say about the old leases?

A. I never discussed the matter with the Smiths.

Q. You never went to see the Smiths at all?

A. No, sir.

Q. Well, who owned the land at that time?

A. The Smiths.

Q. And who owned it at the time these leases were given?

A. The Smiths.

Q. The defendants in these cases, you mean by the Smiths?

A. Yes, sir.

Q. You never went to see them at all?

A. No, sir.

Q. Well, did you hear Mr. Smith's testimony yesterday that he was to get \$15 an acre bonus?

A. Yes, sir.

Q. Did you know that at the time you purchased?

A. Yes, sir.

Q. He was to get that bonus?

A. Yes, sir.

Q. Has that been paid to them?

A. Well, there has been a satisfactory settlement made for it, sir.

Q. Well, now, will you state whether or not that has been paid?

Mr. SIMMONS: Now, wait, we object.

Mr. PARKER: It is not cross-examination.

The MASTER: Objection sustained. It is not cross-examination. Exception by complainants.

The WITNESS: I don't hear any people complaining that they didn't get it.

414 Mr. LOWE: That is all.

The MASTER:

Q. Mr. Hennig, what is that 50 acres, the Smith oil land, reasonably worth at the present value and the prospective value?

A. What is it reasonably worth now?

Q. The 50 acres?

A. With the improvements on it as it stands now?

Q. Yes.

A. Well, I would say it was worth forth or fifty thousand dollars? I wouldn't want to sell it for any less than that.

The MASTER: That is all.

Cases Nos. 300 and 301.

GUFFEY

vs.

SMITH.

Proceedings Had Before W. T. Gunn, Master in Chancery, at
Robinson, Illinois, on September 3rd, 1909.

Present:

Asby Lowe, Mr. Dodds, Arthur Young, For complainant.
Abram Simmons, J. A. Hindman, Valenore Parker, For De-
fendant.

Testimony of Gus V. R. Meachim.

GUS V. R. MEACHIM, being first duly sworn on behalf of de-
fendants, was examined in chief by Mr. J. A. Hindman, and tes-
tified as follows:

Q. You may state your name.

A. Gus V. R. Meachim.

Q. Where do you reside, Mr. Meachim?

A. At St. Louis, Missouri.

Q. If you have made any special study and had any experience
in examination of names and writings you may state to the Court
what experience and what study you have had.

A. I have made that a study for about twenty-five years, compar-
ing, reading books, articles, used as a witness and expert in court,
State and Federal.

Q. I will ask you Mr. Meachim to examine the paper marked
in this case Complainants' Exhibit No. 10, and calling your
415 attention to the written line following the word four the
words "James A., and Susannah Smith, rentals. You have
examined that paper before?

A. I have sir.

Q. You may state whether that examination was casual or careful
examination?

A. It was a careful examination. I had the papers in my posses-
sion quite a while.

Q. You may state whether or not, in your opinion, that written
line to which I have called your attention was written after the
signature E. N. Gillespie?

A. It is my opinion it was inserted there after that was done.

Q. I will place in your hands Mr. Meachim the record designated
in this case as the individual record of the Exchange Bank of Mar-
tinsville, on the page following the page numbered 22 in ink, which
follows also page 22, placed upon there with a stamp evidently,
the entry purporting to be April 17, 1906, and ask you if you have
examined that book, that record?

A. I have sir.

Q. You may state whether or not that examination was a careful examination or only a casual examination?

A. I was about seven hours doing it.

Q. Calling your attention to that entry and also to the entry above purporting to be May 10th, and all the entries on that page above, I will ask you whether or not, in your opinion, the entry of April 7th was made after the entry purporting to be May 10th?

A. I cannot state that.

Q. You may state whether or not in your opinion it is in the same ink?

A. It is not sir, in my opinion.

Q. Have you examined other entries in that book purporting to have been made in the months of March and April of the year 1906?

Counsel for complainants objects to other than that one page.

The MASTER: Of course you could not refer to any other pages.

Mr. HINDMAN: I want to show that running all through that record are entries of March, April, May, June, July, August, and September, following the date that this entry purports to have been made on and that they are of the ink, the kind of ink as the entry of May 10th but a year later, which entries purporting to be made a year later in the record are made of the same kind of ink that the entry purporting to have been made on April 7, 1906, is made of.

The MASTER: There can not be any objection to the kind of ink the bank would use.

Mr. HINDMAN: The point I desire to make is this, that the entries made or purporting to have been made in April 1907, are made of the same kind of ink that the May 10th entry is made in but entries made a year subsequent to that time are in the same kind of ink that April 7th was made in.

The MASTER: When you come down to the question what difference does it make when this check was signed and when there is no question of forfeiture.

Mr. HINDMAN: Yes, or contention is that no rental was paid for a year or more after these entries were made.

The MASTER: Well is there any claim that the owner of the land terminated the lease?

Mr. HINDMAN: No.

The MASTER: Well I perhaps don't just exactly understand your theory but if you want to offer any other papers you can examine them and get them in the record.

Mr. HINDMAN:

Q. I will ask you if you have found in that book there entries purporting to have been made on April 7, 1906?

A. I have sir.

Q. You may state whether or not those entries were made in the same kind of ink that that purported entry is made in?

A. In my opinion no.

Q. You may state whether or not those other entries of April

7th were written in the same kind of ink as the entry of May 10th was made in?

A. In my opinion they apparently are.

Objected to as incompetent.

The MASTER: You can examine him on it.

Cross-examined by Judge ASBY LOWE:

Q. What is your position?

A. Title examiner and expert in handwritings.

Q. How do you become an expert at handwriting—is it a specialty.

A. Yes, sir, I have made it a study for about twenty-five years.

417 Q. What do you mean by study?

A. Comparing handwritings whenever I saw them, reading books, magazines, periodicals, testifying in court, being used as a witness, etc.

Q. Am I to understand that your duty as an Abstractor leads you to this as a study?

A. No, sir, it is rather somewhat of a fancy I took up.

Q. Are you an author?

A. No, sir, I have not that honor.

Q. Who are the authors you have read of?

A. Judge Ames' book on Handwriting and a New York man who has written several articles—I cannot think of his name now, but Ames is the standard author.

Q. It is your judgment that James and Susannah Smith, rentals, were written in there after the name E. N. Gillespie?

A. No, sir, the two words "Smith, rentals."

Q. Were written in after the name E. N. Gillespie?

A. That is my opinion, yes sir.

Q. You don't mean to say Mr. Meachim that this entry here James A., and Susannah Smith and the entry of April 7, 1906, wasn't made before this one of May 10, 1906, on the same page?

A. No, sir.

Q. And you don't pretend to say that it wasn't made there on April 7, 1906?

A. No, sir.

Questioned by Mr. HINDMAN:

Q. I wish Mr. Meachim you would explain to the Master why you say these words were written in the check since the signature or after the signature?

A. To me they have a different appearance. They have a different slant and they are much more crowded than the balance of the words, so that if you will measure those two words with the balance of the other words of the same size you will find that they could not have been put in there at the same time.

Q. And will you explain to the Master also why you arrived at the conclusion that the ink in which this entry purports to have been made on April 7th, 1906, is of a different ink from that in which the entries were made elsewhere in the book bearing the same date?

A. Of course from what I can see it is a much brighter ink:
Judge Lowe: You would not pretend to say it was not the same ink?

418 A. I made a chemical analysis of it.

The MASTER: Your opinion is that the words "Smith, rentals" on Exhibit No. 10, was written subsequent to the check?

A. It is my opinion.

Q. Just those two words?

A. Yes sir.

Q. And you think the first part of that line James and Susannah, was written at the time the other was?

A. Yes, at the time the check was drawn.

Defendants rest.

Testimony of F. H. St. Clair.

FRED H. ST. CLAIR, being duly sworn on behalf of Complainants, was examined in chief by Judge Lowe, and testified as follows:

Q. What is your name?

A. Fred H. St. Clair.

Q. What is your business?

A. Cashier of the Martinsville State Bank, Martinsville, Ill.

Q. Are you the same Fred H. St. Clair that has testified in this case at other times?

A. Yes sir.

Q. I will ask you what book that is you have in your possession?

A. That is what we called a journal in our bank.

Q. What bank?

A. That was the Exc-ange Bank at that time? It was changed to the State Bank.

Q. State Bank where?

A. Martinsburg, Illinois.

Q. I now offer in evidence Deposit Journal 15, Exchange Bank, Martinsville, Illinois. You may turn to the entries of April 7, 1906, if there is such a page.

A. I have it.

Q. What page is it?

A. Page 347.

Q. You may just commence now and read everything there on page 347.

A. Saturday, April 7, 1906. Deposits.

John W. Davis.....	\$50.00
Lottie Duncan	1.50
419 John Fithian	100.00
John Fithian, guardian.....	300.00
Clark Harmon	35.00
J. Easter & Co.....	85.00
S. W. McClelland	85.00
H. V. McNary	511.21
James Border, Secretary	630.75

Fred H. St. Clair, Secretary	5.25
James A. Smith	5.00
Susannah Smith	22.50
Ida Snavelly	5.00
Louis & Son	40.00
“	30.00
Total	70.00

O. E. Fasig & Co. Second Section deposits	\$50.00
Louis Laury	20.00
Eliza Laury	20.00
E. N. Gillespie	25.00

Q. You have on there a deposit to James A. Smith \$5.00. When was that entry made on that book?

A. Saturday, April 7, 1906.

Q. You have one there Susannah Smith. When was that credit written on there?

A. Saturday, April 7, 1906.

Q. With regard to this suit, is James A. Smith and Susannah Smith mentioned there parties to this suit?

A. Yes, sir.

Q. By whom was that money deposited, if you know?

A. E. N. Gillespie.

Q. In the nature of what?

A. Payment of rentals.

Q. What was it—cash?

A. It was a check.

Q. And what was that left for?

A. To pay the rent.

Objected to. It is going into something that has been gone into before.

The MASTER: That has been proven; I think it is sufficient.

Q. I will ask you now if that was left in one check or in two checks?

A. In one check.

Q. And what was the gross amount of that check?

420 A. \$27.50.

Q. Now have you any evidence of having collected this check or remitted to it some other bank or banks?

A. Yes, sir.

Q. You may produce that evidence if you have it.

A. Here it is.

Q. What have you now in your hands Mr. St. Clair?

A. The loose leaf remittance register of the Exchange Bank of Martinsville, Illinois, for the year 1906, that is the first part of it. This is from January 1, 1906, to January 1, 1907. The Exchange Bank you know was reorganized July 16, 1906, and this is for year 1906 remittances, first part of Exchange Bank, and the balance of course is where the name was changed to the State Bank.

Q. You have testified that Mr. Gillespie made these deposits by way of check?

A. Yes sir.

Q. Have you the evidence of remitting that check?

A. Yes sir.

Q. You may turn to that evidence.

A. I have it.

Q. Is that book numbered?

A. This book has no numbers. It is for remittances of the year 1906. These books are built up as the sheets are put in.

Q. Is that a page?

A. That is a sheet.

Q. I say is that a page number?

A. The pages are not numbered.

Q. What date have you before you?

A. I have April 7, 1906.

Q. You may read what that says.

A. All of it?

Q. I now offer that page in evidence and will ask you to read it.

Q. Each one of these sheets here represent items or remittances we send to particular banks for collection.

Q. To what bank did you send the Gillespie checks?

A. Bankers National Bank of Chicago, Illinois.

Q. You may read that page.

A. Commencing here at the top?

Q. Yes, read it all.

A. Exchange Bank of Martinsville, Martinsville, Illinois, 421 April 7, 1906, Bankers National Bank, Chicago, Illinois, We enclose for collection and credit items marked X, no protest. Respectfully, To the left it says: Remittance sheet, Exchange Bank of Martinsville, Illinois, and the first heading is a number, first column, drawn by, favor of, last indorser and on whom and the amount.

Q. You may continue to read.

A. The first check is No. 47705, drawn by the First National Bank of Newton, Illinois, in favor of us, that means Exchange Bank, on the Bankers National Bank, Chicago, Illinois, amount \$230.51. The second is No. 177,988, Merchants Illinois Bank, Peoria, Illinois, favor of T. D. Murphy & Company, last indorser is Dr. O. F. Rowland, on the National Bank of the Republic, Chicago, Illinois, amount \$1.00. The next is No. 177,981, the Merchants National Bank of Peoria, Illinois, favor of T. D. Murphy & Company, last indorser, L. A. Burnside, on the National Bank of the Republic, Chicago, Illinois, amount \$3.00. The next one is No. 109 drawn by E. N. Gillespie, favor of E. L. Jennings on First National Bank, Cameron, West Virginia, amount \$40.00. The next one is No. 901, drawn by E. N. Gillespie, payable to Exchange Bank on the Calhoun County Bank, Countsville, West Virginia, amount \$27.50. The next check had no number and was drawn by Charles Stillwell and payable to Exchange Bank for the Wicoff Co., amount \$5.00. The next check has no number, drawn by W. E. Burke, favor of George

Ullrey, drawn on the Westfield Bank, Westfield, Illinois, amount \$1.50. A total was made there of \$308.51. That is the first section of that, then more checks were added to the remittance later on. The next was No. 2,192, Boeder & Tress Oil Company 302, I think that is Antler Building, payable to us or to Jeremiah Hills, drawn on the First National Bank of Pittsburgh for \$7.50. The next check is No. 106,958, drawn by D. Merriman, Pension Agent, payable to Louis Laury, on Assistant Treasurer of the United States of Chicago, for \$36.00. The next check is No. 129,265, drawn by J. Merriman, Pension Agent, payable to Eliza Laury, on Assistant Treasurer of the United States for \$36.00, making total remittances of the Bankers National Bank of that day \$388.01.

Q. When was that entry made?

A. That entry was made April 7, 1906.

Q. What have you now?

422 A. I have the Teller's Cash F, Exchange Bank of Martinsville, Illinois.

Q. What page have you of that book before you?

A. Page 485.

Q. What is the date of that page.

A. Saturday, April 7, 1906.

Q. When was that entry made?

A. Saturday, April 7, 1906.

Q. I now offer in evidence that portion of said page referring to the deposits and checks and you may read it.

A. Commencing at the top of the page here you want me to read this print?

Q. Yes, everything on there.

A. Exchange Bank, Saturday, April 7, 1906, Page 485. Deposits.

Deposits	\$30.00
	630.75
	35.00
	50.00
	5.25
	5.00
	22.50
	38.00
	85.00
	5.00
	511.21
	40.00
	1.50
	300.00
	100.00
	85.00
	25.00
	20.00
	20.00
	50.00

Q. Now is that all that refers to any matter in controversy?

A. All on this page.

Q. All on that page?

A. Yes.

Q. I will ask you as to these deposits. You have read one \$5.00 and one \$22.50. To whose credit were those deposits made?

A. You see this is just for the amounts listed there for 423 the purpose of referring and arriving at the total deposits for the day. There are two \$5.00 deposits and one of them was James A. Smith and the \$22.50 was Susannah.

O. Susannah Who?

A. Susannah Smith?

Q. James A. Smith and Susannah Smith—you mean the defendants in this law suit?

A. Yes, sir.

Q. Is there anything else on page 485 of this book with reference to deposits to these two defendants?

A. Yes sir.

Q. You may read them.

A. We have a check thereof \$27.50, that is only one of that amount there. I would state that is the one Gillespie left to pay rental for Smith.

Q. You say Gillespie?

A. Yes, sir.

Q. What Gillespie?

A. E. N. Gillespie.

Cross-examined by Mr. J. A. HINDMAN:

Q. You have in your testimony at various times now referred to how many different books in which entries were made in relation to that transaction?

A. Four, I think; that is if you count this remittance sheet a book, if you consider it a book; that is our remittance register.

Q. Now the first entry that you make when a check is deposited in your bank is what?

A. Do you mean which book we put in it?

Q. What is the first entry made, first notation?

A. The deposit ticket is made out.

Q. Deposit ticket?

A. Yes.

Q. What is the next?

A. It is placed on the journal or blotter.

Q. One of the tickets you have today with you?

A. Yes sir.

Q. And today is the first time you have had that book in court?

A. Yes sir.

Q. How long have you had that book in your custody?

A. I don't quite understand.

424 Q. How long has that book been in your custody?

A. Since April 7, 1906, and before as shown by the date in the first part of the book. I don't just remember where that book begins. It has been there in the bank ever since.

Q. Do you remember of having been interrogated as to the entries

that were made in relation to that transaction when you testified the first time in this case?

A. Do I remember?

Q. Yes.

A. I don't remember all of it.

Q. You remember that you were asked what entries were made and in what books?

A. I think so.

Q. You stated that the only entires that were made were the deposit slip and the individual ledger didn't you?

A. I don't remember.

Q. You don't remember?

A. That is I may have stated the original individual ledger that is the book we consider the original book of entry.

Q. I will ask you if you didn't say that the only record or entry in that bank in relation to that transaction was in the original deposit slip and the individual ledger?

A. No I don't remember that I said that.

Q. And that you was asked then to bring the individual ledger weren't you?

A. Yes, sir.

Q. Now you say that entries were made on at least four different books in that transaction?

A. Counting that remittance register there.

Q. The first record that you testified about is what you designate as the individual ledger?

A. The first record?

Q. Yes.

A. Yes sir, that is what we call the individual ledger or book of original entries but that is what we consider it. The other book is just a leading up, that is where the account is placed.

Q. Will you refer to the entry in this individual ledger in which that transaction is recorded?

A. Yes, sir, I have it.

Q. On what page?

A. This book is not paged; it has sheets. We don't count them pages.

425 Q. On what sheet then?

A. On sheet number 22.

Q. How are those sheets numbered in that book?

A. The sheets are numbered like this. Suppose we begin under the S's and the first fellow on that page is sheet number 1; that is his sheet, and when that sheet gets full it is taken out and placed in a book or binder like this and the sheet we put in to start his new account on is number 1 and he will be number 1 as long as he does business there; that is the reason you found two number 22's.

Q. Did you understand me to ask you about two number 22's? Are they numbered in pen and ink or by stamp or how?

A. Sometimes by rubber stamp and sometimes by pen and ink. How many number 22 sheets are there under the letter S in this book?

A. There are two that I know of.

Q. You see two?

A. Yes, sir.

Q. Are they both numbered with pen and ink?

A. One with rubber stamp and one with pen and ink.

Q. How many pages or sheets are there under the letter S in all?

A. I would have to count and see.

Q. Just turn to the last one and see.

A. The last number is 24.

Q. 24?

A. Yes sir.

Q. Are there two sheets number 24?

A. No I think not.

Q. Are there any other sheets in there bearing a double number?

A. I would have to look through and see.

Q. There are only a few of them I wish you would.

A. You mean just in the letter S?

Q. Under the letter S. We can't go through the whole book.

A. You mean bearing double numbers?

Q. Yes.

A. I find one to start on. The first one in the book has two numbers 1's.

Q. How are they numbered?

A. One with a rubber stamp and one with pen.

428 Q. Why was that done?

A. Why because when we put the first sheets in here we numbered the first page through with rubber stamp and when the second number 1 was put in we didn't have the rubber stamp and used a pen.

Q. What became of the rubber stamp?

A. I think we wore it out.

Q. The pen business was done after the rubber stamp was worn out?

A. I don't know for sure it was worn out but the pen numbers were made after the rubber stamp.

Q. You want that understood that the entries on the pages numbered with a pen were made after the entries were made on the pages that were numbered with a rubber stamp?

A. I judge so, in some cases.

Q. Well is that the reason. It was because the rubber stamp was worn out—that must be true?

A. It might have been.

Q. Well wasn't it?

A. I would not want to state that the rubber stamp was worn out.

Q. You have stated it already. Assuming that that was true, now I want to know that if all those entries that appear upon the pages numbered with pen and ink were made after the entries that appear upon the pages that are numbered with rubber stamp?

A. No, I would not think that all the entries would be in pen and ink.

Q. Did you get a new rubber stamp and commence restamping them again?

A. We might have done so.

Q. What did you do?

A. I can't remember.

Q. Mr. Gillespie was depositing money in your bank for the payment of rentals on a great many different leases wasn't he?

A. I don't remember of any outside of this case. I wasn't attending to that part of the business at that time.

Q. Did you say that he didn't deposit money in your bank for the payment of any other rentals?

A. Yes, sir, he did.

Q. How many others?

A. Two others that I know of.

427 Q. Don't you know of twenty others?

A. No I don't.

Q. How many, in your judgment?

A. Well I only know of two besides the Smiths.

Q. Two?

A. Yes, sir.

Q. How many of the Shoupes?

A. Shoupes?

Q. Yes.

A. I don't know of any.

Q. Don't know of any?

A. No, sir.

Q. Don't you know of any one by the name of Shoupe living over there?

A. No, sir.

Q. You don't?

A. No, sir.

Q. How did the names appear on these records in your handwriting?

A. Shoupe?

Q. Yes.

A. I don't remember. Maybe you have the wrong pronunciation of it. Will you spell it for me?

Q. S-h-o-u-p-e. Now you have no idea who I have reference to do you?

A. No sir I don't. I don't know of any one at all by that name.

Q. You don't remember of writing anybody's name like that do you?

A. No sir.

Q. Now getting back to your former testimony. I will ask you if you didn't testify before in this case that in your bank there were but two entries made in relation to the whole transaction about which you were testifying and that was the original deposit slip and the individual ledger, and that you were asked why you didn't bring the individual ledger with you and you gave as your excuse that you *wasn't* requested to do so?

A. I think that was correct.

Q. And now you say there were four different books in which entries were made?

A. Yes sir.

Q. Why did you so testify before?

A. I didn't understand you.

428 Q. Why did you so testify before that there was but one record in addition to the deposit slip in which any entry was made in relation to that transaction?

A. I don't consider these other books as original entries at all.

Q. There wasn't a word said about original entry was there? You were asked if there was any other record or book in your bank in which an entry was made in relation to that transaction. You said no. You was asked if there was an individual record and you answered that is the book I refer to. That is true isn't it?

A. Yes.

Redirect examination by Judge LOWE:

Q. I will ask you if at the second time you testified, if you didn't state in answer to questions asked by Mr. Hindman and enumerated these books you have here today?

A. Yes, sir.

Q. You were asked Mr. St. Clair and I think you so testified, that it was your understanding the deposit slip and that book constituting the original entries *was* all that was wanted in this case, is that right?

A. Yes sir.

Q. And in obedience to that you brought those two records?

A. Yes sir.

Q. I will ask you if the defendants in this case had served you with subpoena requiring you to bring all four of these books and evidences of this transaction about this matter and which you have testified to-day at the first time you testified, whether or not you would have brought them?

A. Yes sir, would have brought all of them.

Q. Were they in the same condition the first day of June 1909, that they are in to-day?

A. Yes, sir, exactly.

Both sides rest.

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Certificate of Master.

I, Walter T. Gunn, Master in Chancery, hereby certify that the foregoing certificate of evidence contains all the evidence offered by either party upon the hearing before me; and I further certify that I was personally present at the examination of each and every witness therein, that the same was taken in shorthand by stenographers selected by me, who at my request reproduced the same in type-writing, as above, and I further certify that I believe the same accurately states the evidence given.

I further certify that the exhibits named therein were marked

by me for identification and permitted by me to be retained for better security by the solicitors who offered the same. I further certify that the witnesses whose names are attached to the affidavits hereto annexed are entitled to the witness fees for the number of days and number of miles, respectively, named in each affidavit.

Dated this 20th day of December, A. D. 1909.

WALTER T. GUNN.

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Master's Report.

UNITED STATES OF AMERICA:

In the Circuit Court of the United States for the Eastern District of Illinois.

No. 330.

JOSEPH F. GUFFEY, A. S. GUFFEY, E. N. GILLESPIE, AND ROBERT Pitcairn, Jr., Copartners Trading as Guffey, Gillespie & Pitcairn, .

VS.

JAMES A. SMITH, H. E. WILCOX, J. W. SOLLEY, C. F. JOHNSON, Walter Hennig, The Ohio Oil Company, a Corporation, Perry A. Little, and Lewis E. Willett,

and

No. 331.

JOSEPH F. GUFFEY, A. S. GUFFEY, E. N. GILLESPIE, AND ROBERT Pitcairn, Jr., Copartners Trading as Guffey, Gillespie & Pitcairn,

VS.

SUSANNAH SMITH, H. E. WILCOX, J. W. SOLLEY, C. F. JOHNSON, Walter Hennig, The Ohio Oil Company, a Corporation, Perry A. Little, and Lewis E. Willett.

To the Honorable Francis M. Wright, Judge of said Court:

The undersigned Master in Chancery of said Court, to whom was referred the above entitled causes, by orders entered therein, to take the proofs, and report the same, together with his conclusions of law and fact, respectfully reports:

That the said causes were set for hearing before the Master in Chancery on the 24th day of June, A. D. 1909, at Danville, Illinois, and testimony was taken on that date, and from day to day thereafter until the taking of evidence in both cases was concluded, there appearing Messrs. Jones, Callahan & Lowe, Arthur E. Young, Charles Troup, Golden, Scholfield & Golden, and James H. Beal, on behalf of the complainants, and Parker & Eggleston, 431 Abram Simmons, and J. A. Hindman, on behalf of the defendants.

That solicitors for the complainant offered in evidence their papers and instruments in writing, hereinafter described, and caused to be sworn in complainants' behalf witnesses, whose names are hereafter found in the stenographer's report of evidence, hereto attached and duly certified, and made a part of this report.

That solicitors for defendants offered in evidence their papers and instruments in writing hereinafter described, and caused to be sworn in defendants' behalf witnesses, whose names are hereafter found in the stenographer's report of evidence, hereto attached and certified as above stated, all of which exhibits and testimony referred to, are made a part of this report, and herewith returned into court.

That having considered the pleadings in said causes, and the evidence introduced upon behalf of both the complainants and the defendants, and having heard the arguments of counsel, and being fully advised in the premises, the Master submits the following report to the court:

Statement.

The bill in this case was filed on March 24th, 1907, by the complainants, asking for relief and injunction against the defendants. The charges in the bill, briefly, are as follows:

That the complainants are citizens and residents of the State of Pennsylvania, and the defendants citizens and residents of the State of Illinois, and that the amount in controversy is more than Two Thousand Dollars.

That on the 22nd day of May, 1905, James A. Smith, one of the defendants, being the owner of the west half of the northeast quarter of the northeast quarter of Section Eleven (11), Township Eight (8) north, Range Fourteen (14) west, in Crawford County, Illinois, executed and delivered to one M. A. Walton an oil and gas lease for said premises, which is set out in the bill in haec verba.

That on the 23rd day of November, 1905, the said M. A. Walton, for a valuable consideration, assigned said lease to one R. L. Prosser, and that the said R. L. Prosser, on the 26th day of December, 1905, assigned said lease to E. N. Gillespie, one of the firm of Guffey, Gillespie & Pitcairn, the complainants for the use of the complainants, which was, duly entered of record on the 15th day of June, 1906, and that such oil lease is now the property of the complainants; that they have been ready, able and willing to enter the premises, and fully develop the same for oil and gas, in accordance with the provisions of said lease, and that they have in accordance with the terms of said lease paid all rentals due hereon, as therein specified.

It is further averred that on or about the 23rd day of March, 1906, that the said James A. Smith executed and delivered to one H. E. Wilcox an oil and gas lease on the same premises, and on the same day executed a second lease to the said H. E. Wilcox on the same premises, both of which were duly entered of record, and which constitute a cloud upon the complainants' title.

The said bill shows further that on the 9th day of August, 1906,

the said James A. Smith executed and delivered to one C. E. Allison another oil and gas lease on the said premises, and that on the 28th day of January, 1907, said lease was duly entered of record in the records of Crawford County, Illinois; that in September, 1906, the said Allison assigned said lease to one Lewis E. Willett, and that afterwards, on the 25th day of March, 1907, the said Lewis E. Willett assigned his interest in said Allison lease to J. W. Solley and C. F. Johnson, which said assignments were duly entered of record in said County.

It is further averred in said bill that the said J. W. Solley and C. F. Johnson became indebted to Perry A. Little and Lewis E. Willett in the sum of Twenty Thousand Dollars, and executed a mortgage on said premises; which said mortgage, as well as said lease, and the assignments thereof, constitute a cloud upon the complainants' title.

It is further averred that one Walter Hennig has acquired an interest in said lease of Solley and Johnson.

It is further averred that all of said leases and assignments of leases subsequent to the execution of the complainants' lease are null and void, and of no force and effect, and constitute clouds upon the title of complainants, and the complainants therefore pray that the defendants, and their representatives, be enjoined from entering upon said premises, and producing oil and gas therefrom, and that all of the defendants be restrained from interfering or hindering the complainants from developing or using said premises for oil and gas, and that the defendants, Solley, Johnson, and Hennig,
433 be required to make discovery, and account for all oil and gas sold by them.

On February 15th, 1909, the defendants, Smith, Solley, Johnson, and Hennig, filed an answer in which they in brief deny that the Walton lease, under which the complainants claim, was a valid contract, by reason of its lacking a valid consideration. That it denies that the rent has ever been paid to the owner of the real estate, and that the said lease has become forfeited for failure to pay rent. That said lease, under which complainants claim, contains a surrender clause, which gives them the option, at any time, upon the payment of one dollar, to surrender and cancel said lease, and that the presence of such clause in said lease, bars the complainant from seeking relief in a court of equity.

Deny that there was any collusion between the defendants, or that the respective leases constitute a cloud upon the title, or that the complainants are entitled to any of the relief prayed for.

It is further averred in said answer that Walton was a mere speculator, and took leases in "wild cat" territory, hoping that they would rise in value, and thereby be a source of profit to him, and generally deny that the complainants are entitled to any of the relief prayed for in the bill.

The other case, wherein Susannah Smith, instead of James A. Smith, is a defendant, is substantially the same as the former case, and the allegations in the bill are the same, except as to the

description of the land owned by the said Susannah Smith, and the pages where the leases on her land were recorded.

The substantial facts in the two cases are the same, and before the Master, the taking of the evidence in these cases was consolidated, and the cases tried upon the same issue.

Findings of Fact.

The Master, from a careful consideration of all the evidence introduced, both by the complainants, and by the defendants, finds as matters of fact:

1. That the complainants, Joseph F. Guffey, A. S. Guffey, E. N. Gillespie, and Robert Pitcairn, Jr. are citizens and residents of the State of Pennsylvania; that the defendants, James A. Smith, H. E. Wilcox, J. W. Solley, C. F. Johnson, and Walter Hennig, 434 are all citizens of the State of Illinois, and residents of the Eastern District thereof.

That the defendants, Perry A. Little, and Lewis E. Willett are citizens and residents of the State of New York; and the defendant, the Ohio Oil Company is a corporation organized and existing under and by virtue of the laws of the State of Ohio, and a citizen thereof; and that the amount in controversy, exclusive of interest and costs, is more than Two Thousand Dollars.

2. That on the 22nd day of May, 1905, James A. Smith, being seized in fee of the west half of the northeast quarter of the northeast quarter of Section Eleven (11), Township Eight (8) north, Range Fourteen (14) west, containing twenty (20) acres, more or less, in the County of Crawford, and State of Illinois, for a valuable consideration, by a certain instrument in writing, commonly called an oil and gas lease, by him duly executed, sealed, acknowledged and delivered, conveyed and leased said premises for oil and gas purposes to one M. A. Walton.

3. That on November 13th, 1905, one R. L. Prosser, who was an employe of the complainants, purchased said lease from the said M. A. Walton, for a valuable consideration, and that on the 26th day of December, 1905, he assigned said lease to E. N. Gillespie, one of the complainants, who has since held the same in trust for himself and the other complainants.

That said lease, and the assignments thereof, were duly recorded in the office of the Recorder of Deeds of the County of Crawford, State of Illinois, on June 15th, 1906, in Lease Record Book 1, at page 450 and page 461.

4. That said lease contains the following provision:

"Upon the payment of One Dollar at any time by the part- of the second part — heirs, successors, or assigns, to party of the first part, — heirs, successors or assigns, — said part- of the second part — heirs, or assigns shall have the right to surrender this lease for cancellation, after which all payments and rentals thereafter to accrue under and by virtue of its terms shall cease and determine, and this lease become absolutely null and void."

These words constitute what is commonly known in oil and gas leases as a "surrender clause."

5. The lease of the defendants contain- a surrender clause in the following language:

435 "In further consideration of the payment of one dollar first party grants unto second party the exclusive option and right to release and terminate this grant, or any undrilled portion thereof, at any time; thereafter all liabilities of said second party as to the portion released shall cease and determine."

6. The Master further finds from the evidence that oil and gas leases containing a surrender clause are in very general, if not universal, use, especially in leasing what is commonly called "wild cat" territory.

Oil and gas are found stored and confined in certain kinds of sand at considerable distance beneath the surface of the earth. Their presence or the presence of oil and gas in paying quantities, can only be ascertained to a certainty, by drilling, and the drilling of such wells in a very expensive method of search, and is by the terms of such lease born- by the opeartor.

The usual custom of exploring for oil and gas in "wild cat," or unexplored territory, is for the operator, if possible, to obtain a large block of territory to be explored for oil and gas. He begins with a test well, and can then go on drilling wells in different directions as signs of oil and gas improve.

If he has a small amount of territory, and should discover oil near the edge of his block of leases, other operators can lease the adjacent lands, and obtain the substantial benefit of his operations. In exploring for oil and gas in new territory, it is customary to drill only one well at a time; as the information gained by drilling each new well, is of advantage in locating the next one.

In many parts of the country it has been found impractical to drill in the winter or spring on account of the impassable condition of country roads for heavy traffic. This, and other conditions, have rendered it customary for oil operators to secure as large a block of land as possible, and to provide in their leases for either the drilling of a well, or the paying of rental, in case of a failure to drill.

The object of the surrender clause is to allow the operator to cancel his block of leases, or any portion of it, at any time. Land may be tested and found to be unproductive of oil or gas, and the land can then be surrendered to the owner. The rental provided keeps on accruing until the time of the drilling of the well, or of the cancellation of the lease, and in a large block of leases,

436 the expense of paying rental amounts to a great deal. Since the object of the lease is to explore for oil and gas, it does not appear that after the field has been tested and found unproductive, that the presence of such a surrender clause is an equitable provision.

7. The Master further finds that the complainants have been at all times financially responsible and able to perform the covenants of their lease; that they have not drilled a well on said

premises, but that they have paid all the rentals required by the terms of said lease to be paid, at the rate of twenty-five cents per acre, and deposited the same in the bank designated in the lease to receive the same, for the owner of the land.

8. The Master further finds that on the 23rd day of March, 1906, the said James A. Smith, the owner of said real estate, again leased said premises for oil and gas to one H. E. Wilcox, there being two leases, both almost identical in terms, and each of said leases contains a provision by which the lessee agrees to stand any expense or damage that may arise from any old lease. These leases were both recorded, but no rights or claims are asserted by any of the defendants under either of these two leases.

9. The Master further finds that on August 9th, 1906, the said James A. Smith again leased said premises for oil and gas to one C. E. Allison. That on September 1st, 1906 the said C. E. Allison, for a consideration of Fourteen Hundred Dollars, sold a block of leases, *totally* ninety acres, including the lease of James A. Smith's land, to one Lewis E. Willett. That the said Lewis E. Willett held the legal title in trust for the firm of Little & Willett, the other member of the firm being Perry A. Little. That said Little & Willett entered upon said premises under said lease, and completed a gas well on said premises in November, 1906. That the said Allison lease, and the assignment thereof, to Willett, were recorded in Crawford County, Illinois, on January 28th, 1907.

That on March 15th, 1907, they gave Walter Hennig, one of the defendants, on option to purchase said Ninety acre tract, and that on March 25th, 1907, by a deed of assignment, they sold the lease in question, together with other fixtures and leases to the defendants, J. W. Solley and C. F. Johnson, and Walter Hennig, the assignment being made to J. W. Solley and C. F. Johnson, and the said Walter Hennig taking a one-fourth interest, which was afterwards assigned to him on April 1st, 1907.

437 That the said defendants, Solley, Johnson and Hennig, have entered upon said land, under said lease, and in the early part of 1907, completed a well on said tract, which produced oil in paying quantities, and that up to the time of the hearing of this case, they had completed four wells on said tract, which produced oil in paying quantities.

10. The Master further finds that prior to purchasing the Allison lease, Willett made inquiry by telephone of the Exchange Bank, at Martinsville, whether or not rentals had been paid on the Walton lease by the complainants, and was informed by the bank that no such payments had been made or deposited to the credit of James A. Smith, although, as a matter of fact, the Master further finds that at the time, the said Bank gave this information, the rental money had in fact been deposited to the credit of the said James A. Smith.

The Master further finds that at the date of such telephone conversation, the said Walton lease, owned by the complainants, was on record in Crawford County, Illinois.

10. The Master further finds that on the 22nd day of May, 1905,

Susannah Smith was the owner in fee of the northwest quarter of the northeast quarter of Section 11, Township 8 north, Range 14 west, except ten acres off of the west side thereof, in Crawford County, Illinois, and that on the date last above mentioned, for a valuable consideration, she duly executed, acknowledged, sealed and delivered a certain article in writing, commonly called an oil and gas lease, to one M. A. Walton.

12. The Master further finds with reference to the lease executed by the said Susannah Smith, that the facts are the same as heretofore found in findings, 1, 3, 4, 5, 6, 7, 8, 9 and 10, relative to the James A. Smith lease, except that the Master finds that the said lease from Susannah Smith to M. A. Walton, and the assignment thereof from Walton to Prosser was recorded in Lease Record 1, at page 450, and the assignment from Prosser to Gillespie recorded in said Book 1 at page 461, and the number of wells drilled in her place to be six in number, instead of four.

The findings of fact relative to the Susannah Smith lease are exactly the same as those relative to the James A. Smith lease, heretofore mentioned, except as to the date of the recording of the various leases, and the number of wells.

13. The Master further finds that the said J. W. Solley, C. F. Johnson and Walter Hennig are in possession of both of said tracts of land, under and by virtue of their assignment of said 438 leases, and that they have placed valuable and lasting improvements thereon, in the way of oil wells, and the fixtures, machinery and buildings necessarily incident thereto.

14. The Master further finds that while the terms of the Allison lease are more favorable to the said James A. Smith and Susannah Smith than the terms of the Walton lease, yet the Master finds that the real parties in interest in this suit are the complainants, Guffey, Gillespie and Pitcairn, and the defendants, Solley, Johnson and Hennig.

15. The Master further finds that there is no evidence in the record, on which to base a decree against the defendants, Perry A. Little and Lewis E. Willett, doing business as Little & Willett, or the Ohio Oil Company, and recommends that said bill as to the said last named defendants be dismissed.

The Master further reports that he has made no finding relative to an accounting in this case, inasmuch as counsel for both sides have agreed that the accounting shall be postponed until the right of either party to the same has been adjudicated by the court.

Conclusions of Law.

The Master, as applicable to the foregoing facts, makes the following conclusions of law:

1. That the oil and gas leases entered into between M. A. Walton and James A. Smith, and Susannah Smith, on the 22nd day of May, A. D. 1905, were valid, enforceable contracts, entered into for a valuable consideration, and binding between the parties.

2. That such contracts were assignable, and that the assignments

made thereof from Walton to Prosser, and Prosser to Gillespie, invested the said Gillespie, for the use of Guffey, Gillespie & Pitcairn, with the legal title to said leases.

3. That the recording of such leases in the office of the Recorder of Deeds, in the County of Crawford, and State of Illinois, was notice to all persons purchasing, or intending to purchase any interest in the oil and gas under said land, of the existence of such prior valid existing contract.

4. The Master further finds that the said C. E. Allison at the time he obtained from the said James A. Smith and Susannah Smith oil and gas leases which were afterwards assigned to Solley, Johnson and Hennig, had notice, either actual or constructive of the existence of the prior oil and gas lease executed to the said M. A. Walton, and now owned by the complainants in this case; and his assignees had like notice, either actual or constructive.

5. That the Walton leases, under which complainants claim title, have never been forfeited for failure to comply with the terms hereof, and up to the time of the filing of this suit, no grounds existed whereby such a forfeiture could be declared.

6. That there is no contractual relation existing between the complainants, Guffey, Gillespie & Pitcairn and the defendants, Solley, Johnson and Hennig.

7. That as against the defendant, Solley, Johnson and Hennig, the complainants are entitled to an injunction, restraining the said Solley, Johnson and Hennig, or their agents, employees, representatives, or any person acting for them, from in any manner interfering with the complainants' entering upon said premises, and developing the same, for oil and gas purposes.

8. That as against the defendants, James A. Smith, and Susannah Smith, in the respective suits, they should be enjoined from assisting the said Solley, Johnson or Hennig from keeping the possession of said premises, under their said leases, as against the rights of the said Guffey, Gillespie & Pitcairn.

9. That the said complainants, as against the defendants, Solley, Johnson & Hennig, are entitled to an accounting in equity for the value of the oil and gas taken from said premises during the time they have been developing the same.

It is a familiar maxim that "Equity regards the substance and not the form" (Texas vs. Hardenburg, 10 Wall. U. S. 89). Hence, in determining the equities in this case, the Master looks behind the mere title of the case to the equities between the real parties to the suit, viz: Guffey, Gillespie & Pitcairn, the owners of the first lease, taken by Walton, and Solley & Johnson, owners of the subsequent lease taken by Allison.

These are the real parties; there are other defendants mentioned, but the real contest here is between those above named for the possession of the land in controversy, to produce oil and gas from the same. If either one of these parties were satisfied, or should withdraw from the suit, the case would be at an

end. Now, Guffey, Gillespie and Pitcairn are the owners of a lease

taken first by Walton on May 22nd, 1905, by him assigned to Prosser on November 13th, 1905, and by Prosser assigned to Gillespie on December 26th, 1905, who holds it for the use of the complainants, and which said lease was duly recorded on June 15th, 1906. Solley & Johnson derived their title by a lease made by Allison August 9th, 1906, assigned to Willett in September, 1906, and thereafter by Willett assigned to Solley & Johnson. Hence, it clearly appears that the lease under which Guffey, Gillespie & Pitcairn claim is prior in point of time.

Both of these leases are on the same land, and made by the same lessor, and it is, therefore, apparent that the real question in this suit is: Which of these lessees as against the other lessee, is entitled to the oil and gas that may be found under said land.

Operations were first had on the land under the Allison lease, now owned by Solley & Johnson, and the latter are in possession of the same, and producing oil and gas in large quantities.

This suit is brought by Guffey, Gillespie and Pitcairn to enjoin Solley and Johnson, who hold under a subsequent lease, from interfering with the complainants' taking possession of the land, and operating for oil and gas, and to enjoin the owner of the land from a like interference, or assisting the said Solley and Johnson.

The leases of the respective parties are similar in form, except as to dates, and amounts, and both contain a surrender clause, the complainants' in the following language:

"Upon the payment of one dollar at any time by the party of the second part, heirs, successors, or assigns, said party of the second part, heirs, successors or assigns, shall have the right to surrender this lease for cancellation, after which all payments or liabilities thereafter to accrue under and by virtue of its terms shall cease and determine, and this lease become absolutely null and void."

And the defendants' lease contained a clause as follows:

"In further consideration of the payment of one dollar first party grants unto second party the exclusive option and right to release and terminate this grant, or any undrilled portion thereof,
441 at any time; thereafter all liabilities of said second party as to the portion released shall cease and determine."

It is claimed by the defendants that the presence of this clause in the lease of the complainants would prevent a court of equity from granting a decree for specific performance, and hence bar the complainant from relief in this case by injunction, under the ruling in *Ulrey vs. Keith*, 237 Ill. 284, which holds that a suit to enjoin a breach of contract is governed by the same rules as a bill for specific performance, and remedy by injunction will be denied if the contract is so wanting in mutuality that the defendant being free from personal bar, could not specifically enforce the contract against the complainant.

Without discussing whether the rule announced in the Illinois case is the rule in the Federal Courts, it seems doubtful whether it has any application at all to the case at bar. The reason that the courts, as between the parties to an oil and gas lease, will not enforce them specifically, is because of a lack of mutuality. These oil leases,

however, have been declared by the Illinois authorities to be a valid, binding contract. (*Watford Oil & Gas Co. vs. Shipman*, 236 Ill. 9; *Ulrey vs. Keith*, 237 Ill. 284.) But the courts simply decline to interfere when a bill for specific performance or injunction is filed. That this rule would be followed between two rival lessees or assignees of such lessees, each claiming under a separate lease containing the same vice or infirmity, to the Master seems exceedingly doubtful. There is no contract relation between the rival lessees. So far as either of them is concerned, the prior lease has the better title. There is no relation between them, whereby the question of specifically performing anything could possibly exist. Between them, it is simply a question of which one, as against the right of the other, is a trespasser. There is no contract relation between them that a court could say is so lacking in mutuality as to bar a bill for specific performance, and unless this element exists, it does not appear on what grounds relief should be denied.

Both of the Illinois cases, viz: *Watford Oil and Gas Co. vs. Shipman*, 236 Ill. 9, and *Ulrey vs. Keith*, 237 Ill. 284, that have passed upon this point, have been cases wherein the suit was between the lessor and the lessee, in which case the rule therein declared would doubtless apply.

442 In *Watford Oil & Gas Co. vs. Shipman*, 236 Ill. 9, in passing on this question, the court says:

"Under this clause the appellant may surrender the lease for cancellation at any time and thereby relieve itself from all future liability under it. The option of appellant to terminate the lease at any time upon the payment of One Dollar deprives appellant of the right to specific performance, directly or indirectly, until it has performed the contract, or placed itself in such a position that it may be compelled to perform the contract on its part."

This language clearly implies, if it does not in so many words state, that it is applicable only between the parties to the lease.

As between two contending lessees, claiming under two separate leases, neither one would have, as against the other, the right to surrender for cancellation, nor if it did, surrender its own lease for cancellation, would it have any effect upon the right of the other lessee; and thus they are not within the reason of the rule.

The later case of *Ulrey vs. Keith*, 237 Ill. 284, follows the *Watford Oil & Gas* case, but in the opinion cites opinions from other jurisdictions. In the *Ulrey* case itself, as well as all the cases cited in the opinion, the suits were between the parties to the contract itself, and not between different parties claiming under different contracts. The law of Illinois up to this point may be summarized as follows:

An oil or gas lease conveys an interest in real estate (*Ulrey vs. Poe*, 233 Ill. 56);

It is a valid, binding contract (*Ulrey vs. Poe*, 233 Ill. 56); and

The surrender clause, even between the parties to the lease itself, does not render the contract illegal and void. (*Ulrey vs. Keith*, 237 Ill. 284.)

If, then, the presence of the surrender clause in the lease is a bar

to the complainants' suit for injunction, it must be because the owner of the land, the complainants' lessor, is a party to the suit. He is, however, while probably a necessary party, only a nominal one, and the relief required against him is not of such a character that it could be said that he was enjoined from violating his contract with the complainant. The complainants simply pray that he may be enjoined and restrained from assisting the owners of the subsequent lease from depriving the complainants of the possession of the land.

443 It seems to the Master that there is a very essential difference between praying that the owner of the land be restrained from violating his own contract, and that of asking that he be restrained from assisting another person to possess and hold the real estate, as against the rights of the owner of the prior lease.

If such were the law, no oil or gas company developing lands under a lease containing a surrender clause would be secure for a moment, as another oil company, under a similar lease, could, with the connivance of the owner of the land, dispossess the first operator by force, and the latter would be deprived of any remedy whatever in the courts. Such a state of affairs, instead of producing any relief, would be a source of disorder and contention, and in many instances, doubtless the cause of armed conflict.

But conceding that the effect of *Ulrey vs. Keith*, *supra*, is that claimed by the defendants, it appears to the Master that the rule is not so rigidly enforced in the Federal Courts.

In the case of *Singer Sewing Machine Company, vs. Union Buttonhole Co.*, Fed. Case No. 12904, the court holds that an injunction may be granted to restrain acts in violation of a lawful contract, although the nature of the contract is such that specific performance cannot be enforced. In that case, a corporation was the owner of certain patents, and granted an exclusive license to the complainant to sell certain machines containing the patented invention, at a stipulated price. After furnishing many machines, the corporation, without the fault of the complainant, refused to deliver more, and assigned the patent to another having knowledge of the contract.

On a bill in equity by the licensee, a preliminary injunction was granted, restraining all conduct that would put it out of the power of the defendants to fulfill their contract, even though it is urged that it was a contract which could not be specifically enforced. The court says:

"It is argued with great ability by the defendants that the complainant is not entitled to specific performance, and therefore it cannot have an injunction which is merely auxiliary. Granting the premises, I am not prepared for the conclusion. If the court cannot order the contract for the making of buttonhole machines to be specifically performed, by reason of the impossibility of superintending the details of such a business, it does not follow that the bill may be retained as an injunction bill. It was formerly
444 thought that an injunction would not be granted to restrain any breach of contract unless the contract was of such a character that the court could fully enforce it on both sides. Upon this

ground, there are many decisions refusing to interfere with contracts for personal services, however flagrant might be the breach of them, but all these cases were overruled by the of the ablest chancellors who ever adorned the woolsack in *Lumsley vs. Wagner*, 1 De G. M. & G. 616. * * * It is now firmly established that the court will interfere by injunction when it cannot decree specific performance."

And referring to the case of *Marble Company vs. Ripley*, 10 Wallace, 339, the same court says:

"I cannot think that the court intended to announce any general proposition that they would never enforce a contract which one party had a right to put an end to in a year. Everything must depend upon the nature and the circumstances of the business. In many of the cases I have cited, the plaintiff had it in his power to end the contract."

In the case of *Joy vs. City of St. Louis*, 138 U. S. 1, a bill of intervention was filed by the City of St. Louis and the Colorado Railroad Company against the Wabash Railroad Company, and its receivers. The bill was filed in two suits, one of which was for a bill to restrain the Wabash Railroad Company and its receivers, from refusing the plaintiffs the right of way of the Wabash Railroad Company. The defendant resisted on the ground, among other things, that since the Wabash Railroad Company did not have the right to compel the Colorado Railroad Company to use its right of way, the contract was not mutual, and equity would not interfere, and the injunction in that case was granted, although the case of *Marble Company vs. Ripley*, *Supra*, was called specifically to the court's attention.

In the case of *Franklin Telegraph Co. vs. Harrison*, 145 U. S. 459, a bill was filed to restrain the Telegraph Company from terminating the plaintiff's use of a wire on its line. The contract provided that the leased wire should, after ten years, belong to the Telegraph Company, but subject to the use of the plaintiff, by the payment of \$600.00 annually.

After the expiration of the ten years, the plaintiff came to demand so much use of the wire, that the Telegraph Company gave notice that they could not afford to furnish plaintiff indefinitely with the exclusive use of the wire, and would terminate the contract.

445 The contract was of such a nature that the defendant could not compel the plaintiff to go on with it, but nevertheless the court held that the injunction should be granted. In this case also the case of *Marble Company vs. Ripley* was cited, but was passed over without any discussion.

Each of these cases, except for the fact that it is a suit for injunction, instead of specific performance, seems to be in fact similar to the case of *Marble Company vs. Ripley*, but the holding of the court therein was exactly opposite.

In the case of *General Electric Co. vs. Westinghouse Electric Co.*, 151 Fed. 664, where a bill was filed for injunction, restraining the further violation by defendant of a contract for the sale of electric equipment, and for an accounting, the injunction was granted, even

though the defendant could not have enforced specifically the plaintiff's agreement, and although there was no mutuality of remedy, the court granted a conditional decree, dissolvable upon plaintiff's failure to perform. The court in that case said:

"There is a class of cases where the defendant may be enjoined from violating the negative part of an agreement, when neither the plaintiff nor the defendant can have specific performance of the affirmative side of the same agreement. The answer of equity in such cases to the want to mutuality in remedy, is a conditional decree for performance or enjoining the violation of the covenant, one good so long as the plaintiff performs, and self-dissolving upon his failure to perform."

In *Western Union Telegraph Co. vs. Union Pacific Railway Company*, 3 Fed. 423, the court makes use of the following language:

"It is insisted by counsel for defendants that the contract set out in the bill is one which requires the performance of continuous duties involving the exercise of skill, personal labor, and cultivated judgment, and that therefore a court of equity will never decree its specific performance, nor enjoin its violation. That the doctrine in its nature incapable of being enforced by a decree for specific performance, is very clear. (*Marble Co. vs. Ripley*, 10 Wall. 339), but it does not follow that a party to such a contract can have no injunction to restrain its breach. It is now settled, I think, by a decided weight of authority that in such cases, although the affirmative specific performance of the contract is beyond the power of the court, its performance will be negatively enforced by enjoining its breach."

A discussion of the principles applicable to specific performance is also found in the case of *Great Northern Railway Company vs. Manchester Ry. Co.*, 5 De G. & S. 138, and in *Woolhampton & Walsall Ry. Co. vs. London & Northwestern Ry. Co.*, L. R. 10 Eq. 433.

A number of cases have been cited by the defendants, which it is claimed hold contrary to these, but in all cases they were based on bills praying for specific performance, and not for an injunction against the breach of a contract.

The Master, from a careful examination of all the Federal authorities, inclines to the belief that the position of the complainants is sustained by the weight of Federal authority.

As above noted, it may be doubted whether the case of *Ulrey vs. Keith* is in conflict with these decisions, inasmuch as the Master is of the belief that no question of specific performance can arise between the assignee of the lessees in this case, since no contractual relation exists between them. But assuming the effect of the State decisions is such as is claimed by the defendants, the Federal Court is not necessarily bound thereby. (*Swift vs. Tyson*, 41 U. S. 1; *Neeves vs. Scott*, 54 U. S. 268.)

The question raised by counsel in this case is one of great nicety and technicality, and one on which there is much conflict of authority, even in the Federal Courts, but since the complainants have proven the material matters charged in the bill of complaint, by a

clear weight of the evidence, the Master accordingly holds that they are entitled to the relief therein prayed.

Respectfully submitted,

WALTER T. GUNN,
Master in Chancery.

447 *Notice of Motion, Filed July 28, 1910.*

Be it further remembered on to wit: July 28th, 1910, the complainants filed in the office of the clerk of said court their notice and motion in the above cause, in the words and figures following, to wit:

UNITED STATES OF AMERICA:

In the Circuit Court of the United States for the Eastern District of Illinois.

In Chancery. No. 331.

JOSEPH F. GUFFEY, A. S. GUFFEY, E. N. GILLESPIE and ROBERT Pitcairn, Jr., Copartners Trading as Guffey, Gillespie & Pitcairn,

vs.

JAMES A. SMITH, H. E. WILCOX, J. W. SOLLEY, C. F. JOHNSTON, Walter Hennig, The Ohio Oil Company, a Corporation; Perry A. Little, and Lewis E. Willett.

Notice of Motion.

To James A. Smith, J. W. Solley, C. F. Johnson, Walter Hennig, The Ohio Oil Company, a corporation, Perry A. Little and Lewis E. Willet, and to Abram Simmons, Jay A. Hindman and Valmore Parker, their solicitors:

You, and each of you, are hereby notified that the complainants in this suit will, by their solicitors or some of them, appear before the said Circuit Court on the twenty-eighth day of July, A. D. 1910, at ten o'clock a. m. on said date, or as soon thereafter as said solicitors can be heard by the said court, and move the court to recommit this cause to the Master in Chancery for the purpose of taking additional evidence and reporting such evidence, together with the evidence already taken, together with his conclusions of law and fact, to the court; a copy of which said motion is hereunto attached.

JAMES H. BEAL,
ARTHUR YOUNG,
CALLAHAN, JONES & LOWE,
CHARLES TROUP,
Solicitors for Complainants.

Filed July 28, 1910,

UNITED STATES OF AMERICA:

In the Circuit Court of the United States for the Eastern District of
Illinois.

In Chancery. No. 331.

JOSEPH F. GUFFEY, A. S. GUFFEY, E. N. GILLESPIE, and ROBERT
PITCAIRN, JR., Copartners Trading as Guffey, Gillespie & Pitcairn,

VS.

JAMES A. SMITH, H. E. WILCOX, J. W. SOLLEY, C. F. JOHNSTON,
Walter Hennig, The Ohio Oil Company, a Corporation; Perry A.
Little, and Lewis E. Willett.*Motion to Recommit.*

Now comes the complainants, by James H. Beal, Arthur Young, Callahan, Jones & Lowe and Charles Troup, their solicitors, and respectfully move the court to re-commit this case to the Honorable W. T. Gunn, the standing Master in Chancery of this court, for the purpose of taking additional evidence and reporting such evidence, together with all other evidence already taken in the case, to the court, together with his conclusions of law and fact upon the same; and in support of this motion complainants file herein the affidavit of Charles Troup which is hereunto annexed and made a part of this motion.

JAMES H. BEAL,
ARTHUR YOUNG,
CALLAHAN, JONES & LOWE,
CHARLES TROUP,*Solicitors for Complainants.*

449 UNITED STATES OF AMERICA:

In the District Court of the United States, for the Eastern District
of Illinois.

In Chancery. No. 331.

JOSEPH F. GUFFEY, A. S. GUFFEY, E. N. GILLESPIE AND ROBERT
PITCAIRN, JR., Copartners Trading as Guffey, Gillespie & Pitcairn,

VS.

JAMES A. SMITH, H. E. WILCOX, J. W. SOLLEY, C. F. JOHNSON,
Walter Hennig, The Ohio Oil Company, a Corporation, Perry A.
A. Little and Lewis E. Willett.*Affidavit of Charles Troup.*

Charles Troup, being first duly sworn on oath, deposes and says that he is one of the solicitors for the complainants in this case,

and that he has been duly authorized to, and does make this affidavit for and on behalf of the complainants.

Affiant further says that as solicitor for the complainants he attended the taking of evidence in this case and in the case entitled Guffey, et al. vs. James A. Smith, et al., No. 331, now pending in this court.

Affiant further says that on one of the dates when evidence was being taken before the Master in Chancery in this case and the case numbered 331, the defendants, Smith, Solley, Johnson and Hennig, being represented in open court by Jay A. Hindman and Valmore Parker, and the defendants, Little and Willet, being represented by Abraham Simmons, and the complainants by A. L. Lowe, Arthur Young and affiant, it was, in the presence and hearing of the Master in Chancery, stated, agreed and understood, between the above counsel, that testimony concerning an accounting for oil run from the wells located on the lands described in the leases in controversy in said suits should not be taken until after the final decree in the cases.

Affiant further says that it was the understanding of counsel for the complainants that this matter had been stipulated upon and entered of record, but that after the Master had filed his
450 report herein and since May, 1910, it was for the first time discovered by counsel for the complainants that no such stipulation or agreement and no words to that effect appear in the record in this case.

Affiant further says that The Ohio Oil Company, a corporation, is, and has been, taking the oil produced from the leasehold in controversy in this case into its pipe lines since the spring of 1908, and was taking oil from the leasehold in controversy in this case when this suit was filed on the twenty-fourth day of March, A. D. 1908, and for this reason said The Ohio Oil Company was made a party defendant to this suit, and that it filed its answer herein but has offered no evidence in its behalf.

Affiant further says that in case the complainants are granted the relief prayed in their bill of complaint against the defendants, Smith, Solley, Johnson, and Hennig, the Ohio Oil Company will be a necessary party and should be, by the final decree in this case, retained in the case for the purpose of accounting for the oil run from said lands.

Affiant further says that owing to the fact that the record in this case does not show the stipulation of counsel above mentioned it is necessary, in order that justice may be done, that this case be re-committed to the Master and additional evidence taken showing that The Ohio Oil Company, a corporation, is, and has been, since the commencement of this suit on March 24th, A. D. 1908, and was prior to that date, taking the oil from the leasehold in controversy in this case into its pipe lines which were, during said time connected with said premises; that such additional evidence be taken and reported by said Master, together with the evidence heretofore taken and reported by him together with his conclusions of law and fact on the same.

Further affiant saith not.

Dated this 14th day of July, A. D. 1910.

CHARLES TROUP.

Subscribed and sworn to before me, a notary public, this 14th day of July, A. D. 1910.

ELIZABETH LEINS,
Notary Public.

[SEAL.]

451

Order of July 28, 1910.

Be it further remembered that on to-wit: July 28th, 1910, the following proceedings were had and entered of record in said cause, to-wit:

Chancery.

JOSEPH F. GUFFEY et al.

vs.

JAMES A. SMITH et al.

Now on this 28th day of July, A. D. 1910, come the complainants herein, by their solicitors, and file and enter their motion to re-refer this cause to the Master-in-Chancery of this court to take further evidence and to report the same, together with his conclusions of law and fact thereon. And the Court having considered said motion and now being fully advised in the premises,

It is Ordered and Adjudged, by the Court, that said motion be, and the same is hereby allowed, and that this cause be, and is hereby re-referred to Walter T. Gunn, Esq., Master-in-Chancery of this court to take additional evidence to be adduced herein and that he report the same to this court, together with his conclusions of law and fact thereon.

And afterwards on to-wit, January 26, A. D. 1911, came Walter T. Gunn, Master in Chancery of said Court and filed in the office of the Clerk of said Court his report of testimony taken in said cause on the re-reference, together with his report of conclusions of law and fact thereon, which said report of testimony and conclusions of law and fact are in the words and figures following, to-wit:

452 UNITED STATES OF AMERICA:

In the Circuit Court of the United States for the Eastern District of Illinois.

File Box #52.

JOSEPH F. GUFFEY et al.
vs.

JAMES A. SMITH et al.

JOSEPH F. GUFFEY et al.
vs.

SUSANNAH SMITH et al.

Filed Jan. 26, 1911. Daniel Hogan, Clerk.

Evidence Taken in Above-entitled Cases at Marshall, Illinois, August 10, 1910, and at Danville, Illinois, August 17, 1910.

Thereupon the complainant- to maintain the issues upon their part, introduced the following evidence:

Testimony of Jerry Burns.

Mr. JERRY BURNS, a witness called upon behalf of the complainants, being first duly sworn, was examined in chief by Mr. Lowe, and testified as follows:

Q. What is your name?

A. Burns.

Q. What is your full name?

A. Jerry Burns.

Q. What is your business Mr. Burns?

A. Foreman of the Ohio Oil Company.

Q. What is the business of the Ohio Oil Company?

A. What is the business?

Q. Yes sir.

A. Well, they are producers, and pipe line departments, producing departments.

Q. Of what?

A. Oil Field.

Q. Do they produce oil?

A. They do.

453 Q. And do they buy oil of other producers?

A. They do.

Q. Do they have a pipe line?

A. They have.

Q. What are your duties with regard to the pipe line?

A. Well, I am foreman of the District, of the field there.

Q. What is the number of your district?

A. One.

Q. Are you acquainted with the land known as the northwest quarter of the northeast quarter of Section Eleven, in Township Eight north of Range Fourteen west, except ten acres off the west side thereof, in the county of Crawford and State of Illinois, known as the Susannah Smith farm?

A. I am.

Q. You may state whether or not there is any pipe line connected with the tanks on that farm.

A. There is.

Q. Whose pipe line is it?

A. The Ohio Oil Company's.

Q. How long has that been connected there?

A. About three years.

Q. Is it connected in such condition that it can run the oil produced from the farm out of the tanks in the pipe line?

A. Yes sir.

Q. You may state whether or not that has been done.

A. It is done.

Q. How long?

A. About three years.

Q. How long have you been working for the Ohio Oil Company?

A. Well, I have been in this field about—a little over four years.

Q. You may state whether or not you are acquainted with the land in Crawford County, Illinois, known as the west half of the northeast quarter of the northeast quarter of Section Eleven, in Township Eight, north, Range Fourteen west, known as the James A. Smith land?

A. I am.

Mr. HINDMAN: Those are matters, I think may be very easily fixed by admission.

Mr. LOWE: I thought so, too, but thought you might insist upon asking them.

The MASTER: The Ohio Oil Company is not here to agree.

454 Mr. TROUP: This is a matter that concerns them, and they are not here.

Mr. HINDMAN: It isn't my desire to ask about matters which are facts.

Mr. TROUP: It is a matter against them, and they have not come here.

Mr. LOWE:

Q. Known as the James A. Smith farm?

A. I do.

Q. Is that in this territory you say is Field number 1?

A. Yes sir.

Q. And is the other piece just described in that same field?

A. Yes sir.

Q. Are there any oil wells on the last piece?

A. Yes sir.

Q. Are there any tanks there?

A. Yes sir.

Q. By tanks, I mean oil tanks. Are they connected with the pipe line?

A. Yes sir, they are.

Q. Whose pipe line?

A. The Ohio Oil Company's.

Q. How long has that been connected?

A. About three years.

Q. Yes sir. Now, you may state, if you know, where the oil is run from the tanks on this farm.

A. It is run into the Ohio Oil Company's pipe line.

Q. How long has that been done?

A. About the same length of time.

Q. Ever since it was connected?

A. Yes sir.

Q. There are no other pipe lines?

— Not that I know of.

Q. And if there were, you would know?

A. Yes sir.

Q. Do you know who owns the oil after it is run in the pipe lines?

Mr. HINDMAN: We object.

Q. You may state, if you know, who owns the oil after it is run into the pipe line.

Mr. HINDMAN: The defendants object to the question for the reason it is asking for a legal conclusion.

The MASTER: You represent Solley and Johnson and——

455 Mr. HINDMAN: Solley and Johnson and the others—and Hennig.

The MASTER: He may answer.

Exception by defendants.

Q. He said you may answer.

(Question is read.)

A. The Ohio Oil Company.

Q. You may state, if you know, who the gentlemen are that are operating these two farms.

A. Well, I don't know whether I can just—well, Solley and others; I don't just know but that's——

Q. Did you ever talk to them about it?

A. No.

Q. Where is the oil being run now from the tanks on these two Smith farms you just identified?

A. From the tanks?

Q. Yes sir.

A. Into the lines.

Q. What lines?

A. Lines of the Ohio Oil Company.

Q. At the present time?

A. Yes, sir.

Mr. LOWE: You may ask him.

(No cross-examination.)

Testimony of J. L. Cook.

Mr. J. L. Cook, a witness called upon behalf of the complainants, being first duly sworn, was examined in chief by Mr. Lowe, and testified as follows:

Q. What is your name?

A. J. L. Cook.

Q. What is your occupation, Mr. Cook?

A. I act as cashier for the Ohio Oil Company.

Q. At what station?

A. Marshall.

Q. How long have you been in that position?

A. In Illinois?

Q. Yes sir, at Marshall.

A. Since about April, 1906.

Q. As such cashier, does it become your duty to know from what farms or tanks the oil is run?

A. Yes, sir.

456 Q. You may state whether or not the Ohio Oil Company buys oil produced in its crude state.

A. It does.

Q. Are you acquainted with the two farms in Crawford County, Illinois, in litigation, known as the Susannah Smith and James A. Smith farm?

A. I know of them.

Q. You may state whether or not there is any oil received by the Ohio Oil Company from tanks on these two farms?

A. Yes sir.

Q. When did they begin, or about?

A. I think about April, 1907, from one of the farms.

Q. And who has been buying the oil from that time to the present, receiving the oil?

A. The Ohio Oil Company has been receiving the oil from that time to the present time.

Q. When does the Ohio Oil Company become the owner of the oil that it receives in its pipe lines?

A. When accepted at the tanks; that, is, the producers' tanks.

Q. Are these tanks on these farms called the producers' tanks?

A. They are.

Q. Who is operating the farm- about which you are speaking, Mr. Cook?

A. Why, to the best of my knowledge, J. W. Solley, Charles F. John, M. Ellis, and Walter Hennig.

Q. You may state whether or not the Ohio Oil Company has been receiving the oil continuously from 1907 to the present time?

A. To the best of my knowledge, yes.

Q. Has anyone else, or any other purchasing form or party, or oil purchaser been receiving it?

A. Not that I know of.

Q. Would you likely know it if they had?

A. I think I would, yes.

Q. Who is receiving the oil from these two farms at the present time, from the producers' tanks?

A. The Ohio Oil Company.

Mr. LOWE: You may inquire.

(No cross-examination.)

Adjourned until August 17th, 1910, at one o'clock, hearing to be had in the Federal Court Room at Danville, Illinois.)

457 At the close of the testimony at Marshall, Judge Lowe asked Mr. Hindman if he would agree that the witness Mr. Cook should bring a statement as shown by the books of the account of the defendants with the Ohio Oil Company of the sale of oil, and would waive bringing the books. Mr. Hindman said that he would do so. Then Mr. Hindman said to Judge Lowe, "Will you allow my clients to bring a statement of their books, and waive the bringing of the books of original entry?" To which Judge Lowe said he would do so, but reserved the right to inspect the books later on, if he deemed it necessary.

Additional evidence taken in said causes on behalf of the complainants, and the evidence on behalf of the defendants, at Danville, Illinois, in the Court Room of the United States Court, before Honorable Walter T. Gunn, Master in Chancery of said Court, on August 17th, A. D. 1910.

Appearances same as before, except that Valmore Parker, one of the solicitors for Defendants, was absent.

Mr. J. L. Cook, being recalled, was further examined in chief by Mr. Lowe, and testified as follows:—

Q. What is your name?

A. J. L. Cook.

Q. Are you the same J. L. Cook who testified in this case at Marshall the 10th day of this month?

A. Yes.

Q. At that time you testified you were cashier for the Ohio Oil Company, at its office located in Marshall, Illinois, is that correct?

A. Yes sir.

Q. As such cashier, are you familiar with the various accounts kept by the Ohio Oil Company?

A. Yes sir, all accounts.

Q. Yes sir, various oil accounts?

A. Oil accounts.

Q. You testified, as I remember it, that you were acquainted with the farms in Section 11-8-14, in Crawford County, Illinois, known as the Susannah Smith and James A. Smith farms; is that

458 correct?

A. Yes.

Q. Has the Ohio Oil Company received any oil from these farms?

The MASTER: That has all been over, hasn't it?

Mr. LOWE: I know, but I am just leading up to what is to follow.

The MASTER: Of course, if you want to put it in—there isn't any necessity.

(Question is read.)

A. It has.

Q. Can you state the amount received from the Susannah Smith farm, and the James A. Smith farm, in each case separately?

A. No, I can't say that from these papers I have here.

Q. Can you from your books?

A. Yes I could from my books.

Q. You may state the number of barrels of oil the Ohio Oil Company has received from the two farms just mentioned, known as the Susannah Smith and James A. Smith farms.

MR. HINDMAN: Now to this the defendants, Hennig, Solley and Johnson each respectively objects for the reason that if it should be made to appear, or should be determined that the complainants in this case have a valid lease upon the premises in controversy, that lease gave them no title to the oil that has been produced upon the premises; it gave them only a right to explore and not title to the oil in or under the premises, or any oil that may have been produced from the premises.

The MASTER: How about oil reduced to possession?

Mr. HINDMAN: They have raised that question, and if they show that oil has been reduced to possession, they would be entitled to recover, but there is no such showing. The question as I understand it is going to oil produced by others than the complainants.

Mr. LOWE: The complainants insist—

The MASTER: He may answer. I will want information on that.

Mr. HINDMAN: The lease—

The MASTER: Go ahead.

Exception by defendants.

(Question is read)

A. 125,396.68 barrels, gross.

Q. What is the value of that oil?

Mr. HINDMAN: To this question, and the answer elicited
459 by it, the defendants, Solley and Johnson and Hennig each separately objects, for the reason previously given, and for the reason further that the value of the oil produced from the premises, even though produced by these defendants, is not the measure of damages, nor is the method now proceeding the proper method of proving any damages, if any was sustained by the complainants.

Mr. LOWE: You may answer, Mr. Cook.

(Question is read.)

Q. Together with the steam earnings.

A. The value of the oil cashed, and still remaining on our books in cash at the present market price would be \$77,926.00.

Q. Is the price just stated by you, and was it at the time you

made the payments, if you have made any, the fair market price for the oil, and the steam earnings?

A. The market price.

Mr. HINDMAN: We desire to make the same objection, both objections previously made, the defendants, Hennig, Solley and Johnson each respectively objects for the reason that if it should be made to appear, or should be determined that the complainants in this case have a valid lease upon the premises in controversy, that lease gave them no title to the oil that has been produced upon the premises; it gave them only a right to explore and not title to the oil in or under the premises; or any oil that may have been produced from the premises; and for the further reason that the value of the oil produced from the premises, even though produced by these defendants, is not the measure of damages, nor is the method now proceeding the proper method of proving any damages, if any was sustained by the complainants.

Q. You may state, Mr. Cook, whether or not the Ohio Oil Company has made payment to any of the defendants in this suit for any of this oil, and if so, state the number of barrels of oil, and the amount of dollars paid therefor, and to whom paid.

Mr. SIMMONS: We object.

Mr. HINMAN: Yes, To this question, and the answer elicited by it, the defendants, Solley, Johnson and Hennig, each separately objects—

The MASTER: I think the objection is well taken; I don't think it is material whether they paid for any of it or not. I don't think it is competent.

Mr. HINMAN: For all of the reasons stated in the previous objections (that if it should be made to appear, or should be determined that the complainants in this case have a valid lease upon the premises in controversy, that lease gave them no title to the oil that has been produced upon the premises; it gave them only a right to explore and not title to the oil in or under the premises, or any oil that may have been produced from the premises; and for the further reason that the value of the oil produced from the premises, even though produced by these defendants is not the measure of damages, nor is the method of now proceeding the proper method of proving any damages, was sustained by the complainants,) and for the further reason that under the issues in this case no recovery could be had for the value of oil received by the Ohio Oil Company from the premises in controversy.

The MASTER: He may answer.

Exception by defendants.

(Question is read.)

Q. Including the steam earnings.

A. We have credited on our books to the account of J. W. Solley proceeds from 45,257.82 barrels; to the account M. Ellis six thousand—

Q. Wouldn't it be better to give the amount they paid Solley for that?

A. For which we have paid him various market prices, \$21, 750.89; to the account of——

Q. Now, just a moment; have you got any money on hand, the value of oil on hand, credited to Mr. Solley, or that he would be entitled to under certain circumstances?

A. Yes sir.

Q. If so, how much?

Mr. HINDMAN: Now, we object to this because the circumstances are not stated.

Mr. LOWE: Well, now——

Mr. HINDMAN: It asks for a conclusion and guess upon the part of the witness.

The MASTER: Go ahead; I suppose the witness will explain it. Exception by defendants.

Q. Go ahead, Mr. Cook.

A. There is still remaining on our books in the account of J. W. Solley, Proceeds from oil amounting to \$6,098.13.

Q. Under what conditions did you pay Mr. Solley the amount of money you have paid him?

461 A. Under bond.

Q. And then why are you holding the \$6,098.13?

A. The bond filed with us by Mr. Solley has reached its limit, the limit, that he has allowed, and for that reason we continue to hold all oil above the amount of this bond.

Q. Now, you may proceed the question as you started a while ago.

A. On the account of M. Ellis we have credited proceeds from 6990.62 barrels, or \$3970.67, all of which has been cashed.

Q. Now, you may go ahead.

A. The account of Charles F. Johnson is credited with proceeds of 35,952.68 barrels, of which amount \$17422.96 has been cashed. There remains on our books \$5132.93 in Mr. Johnson's account.

Mr. HINDMAN: I will ask you to speak a little louder.

A. The account of Walter Hennig we have credited with 16297.03 barrels, paid to him \$8988.48, and there still remains on our books in his account \$118.81.

The MASTER: To what date does that account figure?

A. August 10th, inclusive.

Q. You may state how many barrels of oil has been received by the Ohio Oil Company and credited to what is known as the working interest, or the account of the parties claiming to own the lease, and being the defendants in this case?

A. Both the leases? 104,498.15 barrels.

Q. And what was the market cash value for the oil, as received under the rules and terms of the Ohio Oil Company's manner of doing business?

A. At the various prices cashed, and at the market price today, this oil would be value- at \$65,146.52.

Q. Why do you say "the market price today" Mr. Cook?

A. There is considerable of this oil on our books that has not been cashed.

The MASTER: How do you fix the price of that oil—from the date that it is received, or from the date that they desire to sell it?

Mr. LOWE: Just state——

A. The producer can elect to accept our price at any time.

Q. In case he does not accept that in two months, what is the rule?

A. If he—in accordance with our provision—in the terms of our provision order, if our patrons elect for any reason
462 to cash their oil within two months, on the first business day after the expiration of that time, we close it out at the market price.

Q. On what day?

A. The first business day after the expiration of two months.

The MASTER: What does that mean?

Mr. LOWE: Why, the first business day; if it came on Sunday, it would be Monday, unless a legal holiday.

Q. You may state how much royalty Susannah Smith, one of the owners of one of the farms in controversy in this suit, has received from her farm.

A. 12,079.59 barrels.

Q. Is that the amount Susannah Smith received as royalty?

A. That is the amount she has been paid for. No, I am stating that wrong——

Q. I will ask you further, have you paid her the same royalty all the time, I mean the same royalty interest?

A. For the first several months that we had an account with Mrs. Smith, she drew from the two farms in question a one-sixth royalty.

Q. You don't mean that she drew from the two farms?

A. From her farm.

Q. Yes, sir.

A. On notice to us of this litigation, we held a 1/24 royalty in her farm, or the difference between a sixth and an eighth.

Q. You may state how many barrels of oil she received at the one-sixth royalty.

A. 3424.07 barrels.

Q. And what did she receive in money for that amount?

A. \$2328.37.

Q. At a one-eighth royalty, how much would she have been entitled to, up to the time she received the amount of money just stated; give it in barrels and the value in dollars.

A. I haven't got that figured out, but I can do that in a moment. (Witness figures on paper).

Q. Now, can you give the amount?

A. At a one-eighth royalty, Mrs. Smith would have received for the same time——

Q. Yes sir.

A. 2568.06 barrels.

463 Q. Of the value of what?

A. Of the value of \$1746.28.

Q. You may state whether or not—well—has Mrs. Susannah Smith received any royalty at a one-eighth royalty; if so give the number of barrels and the number of dollars she has received.

A. From these papers, I don't believe I can give that information, without going into a detailed statement.

Q. Haven't you got the number of barrels of oil?

A. I have the total number of barrels of oil but it includes the oil at a one-sixth royalty.

Q. You may state what has become of the oil, or the value thereof, which would be the difference between the one-sixth royalty and the one-eighth royalty that Susannah Smith may have claimed.

A. A one twenty-fourth royalty since notice to us of the litigation on these two farms, or the proceeds, has been held on our books.

The MASTER: Don't those figures date from the time of notice to you?

A. No sir.

Q. Has the defendant, the Ohio Oil Company, received any royalty claimed by James A. Smith, and if so has he been paid therefor, from these farms—no, from the James A. Smith farm.

A. From the James A. Smith farm, we have credited royalty—

Q. Now, just a moment. Did you pay him a part at one-sixth royalty?

A. A part at one-sixth yes.

Q. You may give first the amount that he received at a one-sixth royalty.

A. At one-sixth royalty, James A. Smith was credited with assets from 663.07 barrels, or \$450.88.

Q. How many barrels would he have received at a one-eighth royalty up to that time?

A. At a one-eighth royalty, James A. Smith would have received 497.31 barrels.

Q. And the value?

A. Valued at \$338.16.

Q. Can you tell how much royalty James A. Smith has received since the time you received notice of the pendency of this litigation?

464 A. From the papers I have here, I can't give that information.

Q. Now, you may state, Mr. Cook, how much oil the Ohio Oil Company has received in gross from the Susannah Smith farm in litigation in this controversy.

A. I can't give that from these papers.

Q. You may state how much oil the Ohio Oil Company has received in gross from the farm known as the James A. Smith farm, in controversy in this suit.

A. I am unable to give that information.

Q. Can you give it from your books at the Home Office in Marshall, Illinois?

A. Yes sir.

Q. You may give the value in dollars and cents at the market price therefor, of the oil received by the Ohio Oil Company from the Susannah Smith farm in controversy in this suit.

Mr. HINDMAN: To this question, and the answer elicited by it we—the defendants Solley and Johnson and Walter Hennig, each separately objects for the reasons formerly given, that if it should be made to appear, or should be determined that the complainants in this case have a valid lease upon the premises in controversy, that lease gave them no title to the oil that has been produced upon the premises; it gave them only a right to explore and not title to the oil in or under the premises, or any oil that may have been produced from the premises; and for the further reason that the value of the oil produced from the premises, even though produced by these defendants is not the measure of damages, nor is the method now proceeding the proper method of proving any damages, if any was sustained by the complainants.

(Question is read.)

A. I am unable to give it from the papers I have here.

Q. Can you give it from the books of the Ohio Oil Company, in its Home Office at Marshall, Illinois?

A. Yes sir.

Mr. LOWE: It is agreed by the respective parties, complainants and defendants in this suit that the witness, J. L. Cook, may make a statement from the books of the Ohio Oil Company of the amount of oil received from the Susannah Smith farm in controversy in this suit, together with the value thereof, including steam earnings, and the amount of money paid to the various defendants for oil received from the Susannah Smith farm.

Mr. HINDMAN: Subject to the objections—

Mr. LOWE: And a like statement for all oil and steam earnings received from the James A. Smith farm; that such statement may be made in writing, and submitted to the Master to be attached to his testimony, and made a part thereof.

Mr. HINDMAN: Subject to the objections of the defendants Solley and Johnson and Hennig, as to the competency thereof.

Mr. LOWE: All right, you may inquire.

Cross-examination by Mr. HINDMAN:

Q. Now, Mr. Cook, you have been giving values of the oil received from these respective farms, and have been stating the amount paid to certain of the defendants. I will ask you if these values and amounts include what you call steam earnings?

A. Yes, sir.

Q. And the steam earnings is a certain amount paid by the purchasing company for certain services rendered?

A. Yes sir.

Q. And that service is the steaming of oil taken into its lines, or before taken into its lines; that is a part of the expense of production that the purchasing company pays?

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A. We pay to our patrons one cent per barrel——

Q. No, the question was: It is simply a part of the expenses that you paid?

A. Part of the expenses we paid.

Q. In other words, the producer steams the oil in the tank, is that right?

A. Yes.

Q. Where is that steaming done?

A. He furnishes steam to pump the oil from his own tanks into our lines; for that service we pay him one cent a barrel.

Q. That's part of the transportation expense?

A. It might be considered that, yes.

466 Redirect examination by Mr. LOWE:

Q. What proportion of the amounts you have given here is steam earnings, Mr. Cook?

A. I don't quite understand what you mean.

Q. You have received so much oil worth so much money, and there has been so much allowed for steam earnings, as I understand you, I want to get that amount that is allowed for the steam earnings.

A. In each account?

Q. Yes sir.

A. In J. W. Solley's account there is an allowance of \$541.96.

Q. \$541.96.

A. For steam earnings. In the account of M. Ellis, \$83.68. In the account of Charles F. Johnson \$430.93; in the account of Walter Hennig \$195.59.

Q. What is the total amount of money allowed for steam earnings for all the oil received by the Ohio Oil Company from the two farms in controversy in this suit?

A. \$1,252.16.

Mr. LOWE: That's all.

And here the complainants rested their case.

Defense.

And the defendants, to maintain the issues upon their part, introduced the following evidence:

Testimony of I. L. Neely.

Mr. IRA L. NEELY, a witness called upon behalf of the defendants, being first duly sworn, was examined in chief by Mr. Hindman, and testified as follows:

Q. Your name is Ira L. Neely?

A. Yes sir.

Q. In what business are you engaged, Mr. Neely?

A. I am superintendent of the Fulton Oil and Gas Company.

Q. Has the Fulton Oil and Gas Company oil property in this state?

A. They have.

467 Q. Are you acquainted with the James A. Smith farm, and the Susannah Smith farm in controversy in this case?

A. Yes.

Q. Where, with respect to those farms, is the Fulton Oil and Gas Company's property, of which you are superintendent?

Mr. LOWE: I object; it is immaterial.

A. Why, we join the property on three sides—well, we join it on two sides, and come within forty acres of the property in controversy on another side.

Q. And have you had personal charge of the Fulton Oil and Gas Company's property there in that vicinity?

A. Yes sir.

Q. Have you had charge of the drilling of wells, and acquainted with the production in that vicinity?

A. Yes sir.

Q. Are you acquainted with the value of the lease-hold estate on the Susannah Smith and the James A. Smith farms?

Mr. LOWE: To that we object.

The MASTER: He may answer whether he is acquainted with the value or not.

Exception by complainants.

Mr. HINDMAN: That may be answered by yes or no.

A. Yes.

Q. You may state what the lease-hold interest on those farms is worth.

Mr. LOWE: To that we object as being wholly immaterial and incompetent and irrelevant in this case.

The MASTER: Well, he may answer.

Exception by complainants.

A. I should judge—

Mr. LOWE: Now, we don't want judge; I object.

A. It is a question of my judgment. I should judge \$40,000.00.

Mr. HINDMAN: Yes, that is correct.

Mr. LOWE: We move now, your honor, to strike this answer from the record.

The MASTER: Motion is denied.

Exception by complainants.

Q. That in your opinion is the value of the leasehold estates on both of these tracts of land?

A. Yes sir.

468 Q. What would be the value of the leasehold estate, or what is the value of the leasehold in the James A. Smith farm?

Mr. LOWE: To that we object for the same reason.

A. Well, I should think that it would be about evenly divided between the two.

Q. That is, the leasehold on each would be of the value of about \$20,000.00?

A. Yes.

Q. It would. How long have you been engaged in the oil business?

A. About twenty-five years.

Q. And how long have you been Superintendent of the Fulton Oil and Gas Company?

Mr. LOWE: To that we object.

The MASTER: He may show.

Mr. LOWE: It is immaterial. It has no connection with this law suit.

A. Two years and a half.

Q. And your services have been in the vicinity of the Smith farms during that time?

A. Yes sir.

Mr. HINDMAN: That's all.

(No cross-examination.)

Testimony of J. W. Solley.

Mr. J. W. SOLLEY, one of the defendants, being first duly sworn, was examined in chief by Mr. Hindman, and testified as follows:

Q. You may state your name to the court.

A. J. W. Solley.

Q. You are one of the defendants in this case?

A. Yes sir.

Q. You may state, Mr. Solley, what knowledge, if any you had of the existence of the complainants' lease on these Smith farms, at the time you purchased and acquired your interest in your lease on the farms.

Mr. TROUP: Now, we object to this question; it is immaterial.

The MASTER: I recollect that he has testified that he had no knowledge of the circumstances.

469 Mr. TROUP: We object to it as being immaterial.

The MASTER: He may answer.

A. I had no knowledge. I didn't have any knowledge of Mr. Gillespie's lease.

Q. When did you first learn that the complainants claimed to have a lease?

A. When the summons was served on me in this case; I think that was the 13th or 14th of August.

Q. That is, when the summons was served on you when this case was pending in the State Court at Robinson?

A. At Robinson.

Mr. HINDMAN: That's all.

Cross-examination by Mr. Lowe:

Q. At the time you learned of Mr. Gillespie's lease, from that time on did you make any more developments?

A. Yes sir.

Q. You didn't stop, then, after you did learn?

A. No sir, we finished operating around the lines, outset wells.

Q. You just continued as though there was no suit at all?

A. Yes sir, we had to.

Q. Well, Mr. Gillespie's lease was of record when you purchased was it not?

A. I suppose so, from the suit, but I didn't know of it at the time.

Q. By that, I mean the lease under which the complainants, are claiming in this case, was on record in the office of the Recorder of Deeds in the County of Crawford, in the State of Illinois, being the same county in which the lands in controversy in this suit are situated.

A. I have never seen the record; I suppose so, I never saw it.

Mr. HINDMAN: I object.

Q. You stated that the first knowledge you had was when they served the summons in this case; did you mean the case in the Federal Court, or the State Court?

A. No, in the State Court.

Mr. LOWE: That's all.

70 Redirect examination by Mr. HINDMAN:

Q. You were asked concerning the condition of the record, or what the records in the office of the Recorder would disclose in relation to this lease. You may state what you did in relation to obtaining information concerning the title to this land before you purchased?

Mr. LOWE: To that we object, your honor.

Mr. HINDMAN: To show good faith.

Mr. TROUP: It doesn't amount to anything.

A. I had an abstract made of the title, and the opinion of attorneys in Robinson, Mr. Jones, and then we also took the same abstract Judge Scholfield before we purchased.

Q. You may state whether or not you learned from the abstract you had obtained, or from any other source——

Mr. LOWE: To that we object; we can't be bound by an abstract.

Mr. HINDMAN: I haven't finished the question.

(Question is read.)

Q. (continued)—the existence of the Gillespie lease.

A. No.

The MASTER: At what time?

Mr. LOWE: Now, to that we object, because the complainant cannot be bound by what an abstract may or may not show, and it is incompetent, irrelevant and immaterial.

The MASTER: That is my understanding of the law, but if they want to put it in, let it go.

Mr. HINDMAN: I said from any other source.

Mr. LOWE: Well, we can't be bound by that. It was of record.
The MASTER: Yes, I understand. They want in it, though, so go ahead and answer.

A. No.

Mr. HINDMAN: That's all.

Recross-examination by Mr. LOWE:

Q. Who made the abstract, Mr. Solley?

A. I think the name was McCamey.

Q. Who was your attorney at that time in Robinson?

A. G. W. Jones.

Q. I will ask you whether or not George Jones and the man who made the abstract did not occupy the same office?

471 A. I don't know that I—I never seen McCamey to know that.

Q. Were you ever in Jones' office?

A. Yes sir.

Q. Did you ever see Siler McCamey there?

A. No, I don't know that I did.

Q. From whom did you purchase your interest?

A. From Little and Willett.

Q. Did you have placed in the assignment to you from Little and Willett the words, in substance at least, that they would guarantee the title to the premises?

A. Yes sir.

Q. Was that placed in your assignment?

A. It is in the assignment, yes sir.

Q. Why was that put in there?

A. So as to make a good title.

Mr. HINDMAN: To that we object.

Mr. SIMMONS: That is in the evidence.

Q. You don't mean to say that assignments generally have that in them?

A. I don't know as they do.

Q. I will ask you why you had that put in there, Mr. Solley.

A. I didn't have it put in.

Q. Why was it put in?

A. It was there, I didn't read the assignment till after it was signed.

Q. You wanted them to guarantee the title?

A. I would want anybody to; we have a good big sum for the lease—

Q. Did you say you would want anybody?

A. Yes sir, any person to guarantee title.

Q. Is that in your other assignments where you purchased oil property?

Mr. HINDMAN: We object.

The MASTER: Objection sustained.

Mr. LOWE: I will show that he never took any trouble to have such a provision put in his other assignments.

he MASTER: I don't think it makes any difference.
ception by complainants.
r. LOWE: That's all.

Testimony of C. M. Weekley.

r. C. M. WEEKLEY, a witness called upon behalf of the defend-
being first duly sworn, was examined in chief by Mr. Hindman,
testified as follows:

You may state your name to the court.

C. M. Weekley.

In what business are you engaged, Mr. Weekley?

I am bookkeeper.

Bookkeeper for whom, or what company?

Different companies, including Solley and Johnson.

I will ask you if you, as bookkeeper, kept and have a record of
expenditures made in the development of the Smith farms in
roversy in this case, and also the cost of production of oil from
e farms?

Yes sir.

r. LOWE: To that the complainants object for the reason it is
lly incompetent, immaterial and irrelevant, in this case.

he MASTER: Well,—he has answered.

r. LOWE: Do you overrule the objection?

he MASTER: To that extent, yes.

ception by complainants.

You may state what those expenses were.

r. LOWE: To that we object, as being wholly incompetent, irrele-
and immaterial in this case.

he MASTER: Well, he may answer.

ception by complainants.

Question is read.)

According to the accounts of Solley and Johnson, we have
ended in the account of James Smith and Susannah Smith
404.01.

You may state what those expenditures were for.

r. TROUP: Now, we object to that.

r. LOWE: Let him give the expenditures; we object to it as in-
petent. Now, we make the further objection that he should
what they are, not what the amount is, but in detail.

r. HINDMAN: That is what we are asking for—in detail.

They were made for material and developing—

You have the items there?

Yes sir.

Mr. LOWE: Let us see it. There may be other objections,
if we can get hold of them.

Witness hands papers to Mr. Lowe.)

Mr. Lowe hands papers to Mr. Hindman.)

I will ask you to state Mr. Witness, whether you have in your

possession (handing papers to witness), and now before you, an itemized and correct statement from the books of the expenditures made upon these leases in relation to the development and production upon these premises?

A. They are the same as the original entries, with the exception of the time for pumping and rousting and supplies and repairs for the wells, a part of which pumping, rousting, repairs and supplies in the original entries were not designated to what certain farms the labor or supplies belonged. In that case, I divided the amounts in the following proportions—

Mr. LOWE: To that we most certainly object. He says that he himself took it and divided it as he thought it should be divided.

The MASTER: Go ahead and make your explanation.

Exception by complainants.

A. In the following proportions: two-sevenths to James Smith and two-sevenths to Susannah Smith.

Q. Now, the rousting that you speak about—

Mr. LOWE: Now, just a moment. We renew our objections to this, as he has sought himself to divide expenses between these farms with other farms.

Mr. TROUP: There is only four-sevenths here.

Mr. LOWE: And to that we object.

The MASTER: What is that expense, rousting, etc.?

WITNESS: Rousting, pumping, repairs, and supplies.

The MASTER: How did you arrive at your division?

A. There are six wells on the James Smith, six wells on the Susannah Smith, and nine wells on the other two places operated by Solley and Johnson.

Mr. HINDMAN: Then you made the division according to the number of wells?

A. Yes sir.

Mr. LOWE: Now, we renew our objection again.

The MASTER: Overruled.

Exception by complainants.

Q. Now, you may state what those expenses were.

A. The total expenses?

474 Q. Give the itemized statement of those expenditures.

A. Well—

Mr. LOWE:

Q. Did you keep the books of original entry, Mr. Weekley?

A. No, not all the time.

Q. Then you don't know whether they are correct or not, of your own personal knowledge?

A. No, not until up to the time that I kept them myself.

Q. You don't know anything about it?

A. I know—

Mr. LOWE: We object, your honor.

Mr. TROUP: This witness says that he does not know about these books over a certain length of time until he kept them.

The MASTER: I understood he said it was a correct statement taken from the books. I understand that the agreement was to take these things from the books. What is the objection?

Mr. HINDMAN: He says it is a copy of the books of original entry.

The MASTER: There was no question of the other witness on the stand as to the correctness of the books.

Mr. LOWE: Yes, but he testified that he didn't keep the books all the time, and doesn't know whether they are correct or not.

The MASTER: The agreement was that the statement should be taken from the books. What is the objection.

Mr. LOWE: This witness testifies to the value of certain property, and he says he didn't keep the books all the time and doesn't know. Now, we object unless this witness knows these amounts were paid; it is incompetent. We should not be bound by a statement which he doesn't—

The MASTER: I think that is covered by your agreement that you have a right to inspect the books.

Mr. LOWE: We object that if the books do show these facts it isn't competent evidence, if the man doesn't know whether they are correct or not.

The MASTER: It is merely in proof of payment.

Mr. LOWE: We contend that it is not proof of payment at all.

The MASTER: Well, I will overrule the objection.

Mr. HINDMAN:

Q. Mr. Witness, you may state whether or not this paper or statement marked Exhibit "A-1" is the transcript or statement made from the books of the original entry about which you have testified?

A. It is made from the original entry.

Q. You made it yourself?

A. Yes sir.

Mr. HINDMAN: We offer the exhibit in evidence.

Mr. TROUP: Now, if the court please, we want to object to the introduction in evidence of this exhibit for the reason we think it is not competent under any circumstances. We understand the rule of evidence to be—

The MASTER: You object to the competence and not to the form?

Mr. LOWE: Oh no; it is to be considered as thought it was the regular book.

Mr. TROUP: We further object to that on the further ground that it could not be introduced as going to the question of damages, and it is not binding on us because it is not shown here that the amounts are reasonable values of the services performed, or labor, or materials. There is no proof that those amounts were the reasonable value of those services, or that the amounts were actually paid.

The MASTER: The objection will be overruled.

Exception by complainants.

Mr. HINDMAN: That's all.

(A copy of which said exhibit is as follows:)

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Master's Report.

Voucher No.	Date	TO WHOM PAID.	DESCRIPTION.	JAMES SMITH				SUSANNAH SMITH			
				Material	Developing Expense	Operating Expense	General Expense.	Material	Developing Expense	Operating Expense	General Expense
1007	4/6	Henry O. Wilkin,	Recording Assignment				.44			37.80	.44
1001	4/10	S. C. Shanley	18 days labor							34.90	
1003	4/10	Jas. Tyhurst	18 days labor								
1006	4/10	Little & Willet	Material, Drilling & Team-					456.09	585.40		
			ing								
1008	4/30	North Fork Oil Co.	Stationery and blanks							16.72	10.31
1009	4/30	Jas. Tyhurst	Pumping and rousting								
1010	4/30	Chester Payne	Hauling 2" line			16.72			5.00		
1011	4/30	Cliff Robinson	Transferring casing						1.08		
1013	4/30	George Matheney	Pumping and rousting							2.82	
1014	4/30	Vergil Payne	Rousting							4.34	
1015	4/30	F. E. Hill	Pumping							8.04	
1016	4/30	S. G. Hobbs	Pumping							2.47	
1017	4/30	John Payne	Shackle posts	2.51				2.51			
1018	4/30	T. N. Matheney	Hauling 2" line						5.00		
1019	4/30	Ben Milner	Hauling tank						10.00		
1020	4/30	Amos Roberts	Hauling tools						4.00		
1021	4/30	Sam Fouty	Hauling lumber						5.00		
1024	4/30	Fred Ayers	Hauling lumber						5.00		
1026	4/30	C. V. Debord	Hauling lumber						5.00		
1027	4/30	Ed Newlin	Hauling lumber, tank & 2" line								
1028	4/30	Melville Fayne	Hlg. tanks, rods, casing, boiler						18.00		
1029	4/30	Wm. D. E. Bord	Hauling tank & lumber						37.50		
1030	4/30	B. O. Grant	Hauling casing						15.00		
1033	4/30	Jesse Davidson	Hauling csg. tank & Lumber						5.00		
1034	6/3	F. E. Hill	Pumping		19.05	19.17			30.00	19.17	
1034	6/12	A. I. Goff	Foreman			19.05			19.05	19.05	

Expenditures by Solley & Johnson.

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1035	6/12 C. H. Stater	Rousting	5.72		7.80	5.72
1036	6/12 Vergil Payne	Rousting, bldg. tank houses, etc	10.77		10.77	10.77
1037	6/12 Chas. Tool	Digging ditch, etc.	18.58		2.57	18.58
1038	6/12 S. G. Hobbs	Pumping			10.00	
1039	6/12 Jesse Davidson	Hauling casing			10.00	
1040	6/12 Wm. D. E. Bord	Hauling casing and rods			5.00	
1041	6/12 J. C. Kennedy	Hauling posts			1.25	
1042	6/12 B. O. Grant	Pulling well			5.00	
1043	6/12 Chas. Bline	Hauling lumber			2.50	
1044	6/12 Fred Ayers	Hfg. Rods, pump outfit & pig. well			5.00	
1045	6/12 Melville Payne	Hauling casing			25.56	
1046	6/12 Riley Bline	T. C. Hooks, links & Stirrups	11.15		11.15	
1048	6/12 Jarecki Mfg. Co.	Pumping			462.50	
1049	6/30 O. K. Gause	Bonus				450.00
1050	7/1 Mrs. S. Smith	\$ - 250 Bbl. tanks				
1051	7/3 Pbg. R. & R. Co.	Foreman	11.43		11.43	
1052	7/13 A. I. Goff	Hauling Sewer Pipe			5.00	
1053	7/13 Jesse Davidson	Hauling sewer pipe, pig. well			2.50	
1054	7/13 Chas. Bline	Hauling casing			5.00	
1055	7/13 Sam Fouty	Hauling casing and material			7.50	
1057	7/13 Chester Payne	Hfg. fittings, rods, line, pig. well			11.00	
1058	7/13 Melville Payne	Labor, developing & operation			6.19	
1059	7/13 J. C. Kennedy	Pumping	11.14		11.14	
1060	7/13 Riley Bline	Rousting	18.58		18.58	
1061	7/13 Vergil Payne	Gas engine oil	2.86		2.86	
1062	7/13 S. G. Hobbs	Shackle work and posts	2.02		2.02	
1063	7/13 C. H. Stater	Office expense & paid for rousting			5.72	
1064	7/13 Standard Oil Co.	Lumber	18.96	1.73	18.96	1.73
1065	7/13 John Payne	Foreman			11.43	
1066	7/13 C. S. Shilling					
1067						
1068	7/13 LeMay Johnson Lbr. Co.					
1071	7/31 A. I. Goff					

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Expenditures by Solley & Johnson.

Voucher No.	Date	TO WHOM PAID.	DESCRIPTION.	JAMES SMITH				SUSANNAH SMITH			
				Material	Developing Expense	Operating Expense	General Expense	Material	Developing Expense	Operating Expense	General Expense
1086	1907	7/31 Casey Mch. Shop	Pulling machine	50.58				50.58			
1101	8/31	Chas. Bline	Hlg. lumber, line, casg. pulg well		15.00				10.00	5.00	
1102	8/31	Jas. Bell	Labor, developing & operation			8.40			7.80	8.40	
1103	8/31	Riley Bline	Hauling tanks, etc.		7.80				7.80		
1104	8/31	Lewis Hackett	Hlg. casg., 2" line, tank, etc.		52.00						
1105	8/31	Fred Fitch	Hlg. tanks, line & casing.		16.25				7.50		
1106	8/31	Chester Payne	Hlg. casing and sewer pipe		15.00						
1107	8/31	Geo. Green	Setting tanks		30.00				5.00		
1108	8/31	Brodt & Burk	Office expense		5.00				24.00		
1109	8/31	C. S. Schilling	Drilling S. Smith No. 2, 3,		24.00		8.50		2908.00		8.50
1110	8/31	Hennig & Ewing	4, 5 and cleaning out boiler						601.00	10.21	
1111	8/31	Ewing & Johnson	Drig. S. Smith #1, repairing boiler								
1114	9/10	C. Vaughn	Nails	.75							
1115	9/10	Bessmer G. E. Co.	Engine oil			2.35				2.35	
1116	9/12	LeMay Johnson L. Co.	Lumber	2.741				48.81			
1117	9/12	Natl. Equip. & S. Co.	2" line	84.59							
1120	9/11	Hennig & Ewing	Drilling J. Smith No. 1, etc.		771.00			1618.19			
1123	9/21	Natl. Supply Co.	Material								
1124	9/24	Pkg. R. & R. Co.	4 - 250 Bbl. tanks	370.00							
1126	9/30	Jesse Davidson	Hauling lumber		5.00				5.00		
1127	9/30	Riley Bline	Hauling 2" line & tank		4.00						
1130	9/30	Louis Hackett	Hauling rods		2.50						
1131	9/30	L. W. Kneisley	Stringing line		.36				.36		
1132	9/30	Chester Payne	Hlg. 1" pipe & Fittings		.72				.72		
1133	9/30	Chas. Jacob	Hauling tank		5.00						
1134	9/30	Ed McKee	Hauling tank		5.00				5.00		

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1135	9/30 S. G. Hobbs	Pumping	18.58	1.86	10.06	18.58	1.86	10.06	11.84	1.94	13.00
1136	9/30 R. S. Hobbs	Rousting	1.86	8.05		7.43	8.05		2.10		2.10
1137	9/30 Jas. Bell	Labor, developing & operation	7.43	1.28		1.28	1.28		1.43		1.43
1138	9/30 Raymond Hennig	2 days labor			10.06						
1139	9/30 W. J. McClure	Foreman									
1140	9/30 C. H. Steteler	Rousting									
1141	9/30 C. A. Burk	Setting tank									
1142	9/30 L. G. Bradstreet	Setting tank									
1143	9/30 C. S. Schilling	Office expense									
1144	9/30 Wiley Wiman	2 days labor	4.33								
1145	9/30 Lester Payne	Pulling well									
1146	9/30 Scott Jones	Pumping	18.58								
1147	9/30 Walter Hennig	Telephone tolls									
1148	9/30 F. A. Robinson	Guage Table									
1149	10/08 Du Pont Powder Co.	Shooting S. Smith No. 2, 3 & 4	475.00								
1150	9/31 W. K. McClure	Foreman	2.86								
1151	10/31 Geo. Mitchell	Pumping	9.38								
1152	10/31 Jas. Bell	Pumping	3.59								
1153	10/31 S. G. Hobbs	Pumping	18.58								
1154	10/31 Scott Jones	Pumping	5.39								
1155	10/31 Wm. McKay	Pumping	2.58								
1156	10/31 J. D. Porter	Rousting	1.10								
1157	10/31 Wiley Wiman	Rousting	2.10								
1158	10/31 L. F. Havely	Rousting	1.30								
1159	10/31 R. S. Hobbs	Building tank house	4.19								
1160	10/31 John Downey	Building tank house	2.09								
1161	10/31 C. H. Steteler	Driving hooks	2.10								
1162	10/31 Lester Robinson	Pulling well									
1165	10/31 Chester Payne	Hauling 2" pipe	1.43								
1166	10/31 Jesse Davidson	Hauling casing	1.43								
1168	10/31 Chas. Blane	Pulling wells									
1172	10/31 C. F. Schilling	Office expense & Paid for fig. well	11.84								
1173	10/31 C. F. Schilling	Stock certificates & Seal	1.04								
1176	10/31 Moore Printing Co.	Shooting S. Smith No. 5	209.00								
1178	11/15 Du Pont Powder Co.	Pumping									
1179	11/25 Geo. Mitchell	Material	13.00								
1180	11/26 Natl. Supply Co.										
										1086.71	1474.80

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Voucher No.	Date	TO WHOM PAID.	DESCRIPTION.	JAMES SMITH				SUSANNAH SMITH			
				Material	Developing Expense	Operating Expense	General Expense.	Material	Developing Expense	Operating Expense	General Expense
1216	1907					18.58	8.86			18.58	8.86
1217	12/31	E. H. Hamrick	Pumping well							1.04	
1220	12/31	Chas. Tool	Pulling well							3.15	
1221	12/31	Earl Havely	Pulling well							2.50	
1223	12/31	Jas. Robinson	Office expense								
1224	1908	C. S. Schilling									
1224	1/13	Lester Robinson	Rousting			2.10				2.10	
1225	1/13	Troy Underwood	Rousting			2.40				2.40	
1227	1/18	E. H. Hamrick	Pumping			14.18		20.24		14.18	
1231	1/18	Natl. Supply Co.	Material and supplies	9.34							
1232	1/28	John S. Stanton	Pumping			6.00				6.00	
1234	1/31	Jas. Robinson	Pulling Rods			2.50				2.50	
1235	1/31	J. V. Schilling	Rousting			4.28				4.28	
1236	1/31	Joe Post	Rousting			9.70				9.70	
1237	1/31	Troy Underwood	Rousting and pumping			7.48				7.48	
1238	1/31	G. Hobbs	Pumping			5.40				5.40	
1239	1/31	E. Hyatt	Labor, developing & operating		2.00				2.00		
1240	1/31	G. C. Gordon	Pumping			1.50				1.50	
1241	1/31	C. S. Schilling	Office Expense			8.40				8.40	
1242	1/31	Bert Vaughn	Taxes				8.86				8.86
1244	2/11	Troy Underwood	Pumping			5.79	13.18				13.18
1252	2/23	LeMay Johnson L. Co	Lumber					23.32	10.00	5.70	
1253	2/29	John Geyer	Hauling iron and lumber								
1254	2/29	Chester Payne	Pulling rods								
1255	2/29	M. Payne	Shackle rods, posts					3.96		2.50	
1256	2/29	Harry Whitenack	Pumping			12.81				12.81	
1257	2/29	Dolphus Jones	Labor, developing & operating		1.28				1.28		

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Expenditures by Solley & Johnson.

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Voucher No.	Date	TO WHOM PAID.	DESCRIPTION.	JAMES SMITH				SUSANNAH SMITH			
				Material	Developing Expense	Operating Expense	General Expense.	Material	Developing Expense	Operating Expense	General Expense
1320	1908	5/31 Dupont Powder Co.	Shooting Smith No. 3		210.00					5.00	
1321	5/31	J. E. Dyke & Co.	Drilling J. Smith No. 3 Bal.		157.18					5.88	2.86
1322	5/31	Casey Machine Shop	Repairing Boiler								
1323	5/31	E. A. Robinson	Tank tables	74.69			2.86	2.64			
1324	5/31	Natl. Supply Co.	Supplies							11.14	
1325	6/19	Nolla Spangh	Pumping			11.14				11.76	
1326	6/19	John Francis	Pumping			7.14				7.14	
1327	6/30	V. Schilling	Rousting			1.86				1.86	
1328	6/30	L. W. Post	Rousting			4.34				4.34	
1329	6/30	Thomas Manor	Rousting and Pumping			1.86				1.86	
1330	6/30	Chas. Tuel	Rousting			11.14				11.14	
1331	6/30	Chas. Fants	Rousting and pumping			4.95				4.95	
1332	6/30	David Downing	Pumping			5.00				5.00	
1333	6/30	Chester Payne	Pulling rods		210.00						
1334	6/30	Du Pont Powder Co.	Shooting J. Smith No. 3					65.46			8.58
1335	6/30	National Supply Co.	Supplies	36.75			8.58	50.00			
1336	6/30	C. Schilling	Office Expense								
1337	7/20	C. D. Francis	Building pumper dwelling								
1341	7/31	V. Schilling	Rousting			7.14				7.14	
1342	7/31	David Downey	Rousting			18.86				18.86	
1343	7/31	Chas. Robinson	Pumping and rousting			8.52				8.52	
1344	7/13	Chas. Fants	Pumping			18.06				18.06	
1345	7/13	Lester Payne	Pulling rods								
1346	7/13	Chester Payne	Pulling wells			1.67				5.00	
1347	7/31	Harry Thorpe	Pulling wells			5.00				5.00	
1348	7/13	Tuller Metheney	Rousting			.72				.72	
1349	7/31	Arthur Brown	Hauling lumber						5.00		
1350	7/31	Samuel Brown	Hauling lumber						5.00		

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Master's Report.

Voucher No.	Date	TO WHOM PAID.	DESCRIPTION.	JAMES SMITH				SUSANNAH SMITH			
				Material	Developing Expense	Operating Expense	General Expense.	Material	Developing Expense	Operating Expense	General Expense
1908											
1419	10/31	Plag. R. & R. Co.	Tanks hoops			2.30	8.57			2.30	8.57
1420	10/31	C. S. Schilling	Office expenses			22.81				22.81	
1426	11/30	J. V. Schilling	Rousting			20.00				20.00	
1426	11/30	C. B. Fants	Rousting			4.40				4.40	
1427	11/30	Kenneth Fants	Rousting			10.00				10.00	
1428	11/30	H. H. Thorpe	Pulling wells			2.50				2.50	
1429	11/30	Riley Bline	Hauling				8.57				8.57
1430	11/30	C. S. Schilling	Office expense			10.38				10.38	
1437	12/1	National Supply Co.	Material for repairs			21.43				21.43	
1439	12/31	J. V. Schilling	Rousting			20.00				20.00	
1440	12/31	C. B. Fants	Pumping			3.64				3.64	
1441	12/31	Kenneth Fants	Rousting wells							7.50	
1442	12/31	Lester Payne	Expenses			1.42				1.42	
1444	12/31	Walter Hennig	Office Expense				1.76				1.76
1445	12/31	C. S. Schilling	Lumber for repairs			8.53				8.53	
1446	12/31	LeMay Johnson & Co	Pump				43				43
1447	12/31	Fulston Oil & Gas Co.	Repairing pump	2.28				2.28			
1448	12/31	Casey Machine Shop	Vouchers								
1449	12/31	Moore Printing Co.									
1909											
1451	1/30	J. V. Schilling	Rousting			22.13				22.13	
1452	1/30	C. B. Fants	Pumping			20.00				20.00	
1453	1/30	Kenneth Fants	Rousting			2.44				2.44	
1454	1/30	H. H. Thorpe	Pulling wells			5.00				5.00	
1458	1/31	C. S. Schilling	Office expense			22.54				22.54	
1461	2/27	J. V. Schilling	Rousting			20.00				20.00	
1463	2/27	C. B. Fants	Pumping				8.57				8.57

Expenditures by Solley & Johnson.

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1463	2/27	Thomas Manor	Rousting and pumping	18.86	8.90	8.86
1464	2/27	Lester Payne	Pulling wells	5.00		5.00
1465	2/27	Thomas Manor	Teaming	1.57		1.57
1466	2/27	M. S. Flaherty	Drilling repairs	1.40		1.40
1467	2/27	National Supply Co.	Material for repairs	7.40		7.40
1468	2/27	C. S. Schilling	Office Expense		8.90	
1471	3/31	V. Schilling	Rousting	21.43		21.43
1472	3/31	C. B. Fanta	Pumping	20.00		20.00
1473	3/31	Kenneth Fanta	Rousting	2.13		2.13
1474	3/31	Thomas Manor	Rousting	2.13		2.13
1475	3/31	Lester Payne	Pulling wells	5.00		5.00
1476	3/31	J. Thorpe	Pulling well	2.50		2.50
1478	3/31	National Supply Co.	Material for repairs	4.08		4.08
1479	3/31	C. S. Schilling	Office expense		8.62	
1480	4/30	C. B. Fanta	Pumping	20.00		20.00
1480a	4/30	J. V. Schilling	Rousting	22.28		22.28
1481	4/30	Alex Fanta	Rousting	3.77		3.77
1483	4/30	W. J. King	Hauling line pipe		5.00	
1484	4/30	W. Solley	Paid for teaming	1.42		1.42
1485	4/30	Harry Thorpe	Building dam, pulling well	2.50		2.50
1486	4/30	Riley Blane	Pulling wells	6.75		6.75
1487	4/30	S. N. Payne	Timber	3.00		3.00
1488	4/30	National Supply Co.	Material	42.76		42.76
1489	4/30	C. S. Schilling	Office Expense		9.04	
1490	5/31	J. V. Schilling	Rousting	22.00		22.00
1491	5/31	C. B. Fanta	Pumping	20.00		20.00
1492	5/31	D. Carroll	Rousting	3.65		3.65
1493	5/31	C. W. Varner	Pulling wells	10.00		10.00
1494	5/31	Riley Blane	Pulling wells and teaming	5.00		5.00
1496	5/31	LeMay Johnson L. Co.	Lumber	3.20		3.20
1497	5/31	W. R. Whitney	Timber for dam		8.86	
1498	5/31	C. S. Schilling	Office expense			
1499	5/31	National Supply Co.	Supplies	2.72		2.72
1500	6/30	J. V. Schilling	Rousting	22.42		22.42
1501	6/30	C. B. Fanta	Pumping	20.00		20.00
1502	6/30	Chas. Kelley	Repairing dam			
1503	6/30	Kenneth Fanta	Rousting	.84		.84
1504	6/30	C. L. Palmer	Rousting	1.10		1.10
1505	6/30	Lester Hamilton	Pulling wells	1.67		1.67

Master's Report.

1906	6/30	Lester Payne	Hauling tank	11.83	9.32	3.00	11.83	9.32
1907	6/30	Crane & Tyeheurst	Boiler repairs	21.42			21.42	
1911	6/30	C. S. Schilling	Office expense	20.00			20.00	
1912	7/31	J. V. Schilling	Rousting	3.65			3.65	
1913	7/31	C. B. Fanta	Pumping					
1914	7/31	C. L. Palmer	Rousting			1.42		
1915	7/31	J. W. Solley	Teaming			1.42		
1916	7/31	C. E. Dill	Teaming			1.42		
1917	7/31	Lester Hamilton	Teaming			5.00		
1918	7/31	Lester Payne	Teaming					
1919	7/31	Fred Gaines	Teaming					
1920	7/31	S. N. Payne	Logs & Posts	11.42			2.13	
1921	7/31	C. S. Schilling	Office expense		8.62			8.62
1923	7/31	National Supply Co.	Material	251.98				
1925	8/31	J. V. Schilling	Rousting					
1926	8/31	C. B. Fanta	Pumping	22.94			22.94	
1928	8/31	Lester Payne	Hauling casing, spear & jars	20.00			20.00	
1929	8/31	J. S. Oulp	Hauling spear & jars	7.50			7.50	
1930	8/31	Lester Hamilton	Hauling cog, rods & material	10.00				
				15.00				

Expenditures by Solley & Johnson.

Voucher No.	Date	TO WHOM PAID.	DESCRIPTION.	JAMES SMITH				SUBANNAH SMITH			
				Material	Developing Expense	Operating Expense	General Expense.	Material	Developing Expense	Operating Expense	General Expense
1531	1909	8/31 Wm. Freland	Hauling sand			2.50					8.72
1532	8/31 Fred Gaines		Hauling casing		8.50						
1533	8/31 J. E. Dyke & Co.		Drilling, etc. Smith No. 6		1087.50						
1534	8/31 C. S. Schilling		Office expense								
1535	8/31 Du Pont Powder Co.		Shooting J. Smith No. 6		181.00						
1536	8/31 National Supply Co.		Material	719.32							
1537	Check										
1516	9/30 C. L. Palmer		Foreman			13.90				13.90	
1517	9/30 C. B. Fanta		Pumping			20.00				20.00	
1518	9/30 J. V. Schilling		Rousting			3.58				3.58	
1519	9/30 C. S. Schilling		Office expense								8.58
1521	9/30 John Blinn		Hauling nipple			1.50					
1523	9/30 Lester Hamilton		Pulling wells & Haul Sup- plies			2.67				2.67	
1524	9/30 J. E. Dyke & Co.		Cleaning out, plg. casg., etc., No. 6			191.00					
1525	9/30 Warren Machine Co.		Use of Jars			5.00					
1526	9/30 D. B. Duff		61' casing	42.94							42.94
1527	9/30 Du Pont Powder Co.		Shooting No. 6		174.00						
1528	9/30 Casey Machine Shop		Rental on tools			7.00					
1529	9/30 National Supply Co.		Material	98.50							
1530	10/30 C. B. Fanta		Pumping			20.00				20.00	
1531	10/30 Luther Atkins		Rousting			3.78				3.78	
1532	10/30 Harry Thorpe		Rousting			1.26				1.26	
1533	10/30 O. H. Winkle		Rousting			1.58				1.58	
1534	10/30 C. L. Palmer		Foreman			9.33				9.33	
1535	10/30 John Downey		Cement			.42				.42	
1536	10/30 James Robinson		Plowing rods			.28				.28	
1537	10/30 Harry Thorpe		Pulling rods								5.00

Master's Report.

[illegible]

Expenditures by Solley & Johnson.

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1585	4/30 Claude Sutherland	Pumping	20.00						20.00	
1586	4/30 O. H. Wykle	Routing	.62						.62	
1587	4/30 P. A. Cooley	Pulling wells	2.50						3.75	
1588	4/30 National Supply Co.	Supplies	2.05						2.05	5.72
1589	4/30 Franklin O. & G. Co.	Office expense								
1590	5/31 Chas. L. Palmer	Foreman	14.80						14.80	
1591	5/31 Claude Sutherland	Pumping	20.00						20.00	
1592	5/31 O. H. Wykle	Routing	.94						.94	
1593	5/31 P. A. Cooley	Pulling wells	2.50						5.00	
1594	5/31 National Supply Co.	Supplies and repairs	8.88						8.88	5.72
1595	5/31 Franklin O. & G. Co.	Office expense								
1596	6/30 C. L. Palmer	Foreman	14.70						14.70	
1597	6/30 Claude Sutherland	Pumping	20.00						20.00	
1598	6/30 P. A. Cooley	Pulling wells								
1599	6/30 Wm. K. Woods	Printed Blanks								3.28
1601	6/30 Franklin O. & G. Co.	Office expense								5.72
1602										
			\$4783.15	\$6513.32	\$3279.81	\$2122.17	\$5716.64	\$6362.20	\$3015.01	\$2491.07

Master's Report.

657 JAMES SMITH:

Material	\$4793.15	
Developing expense	6513.32	
Operating expense	3279.81	
General Expense	<u>2122.17</u>	\$16708.45

SUSANNAH SMITH:

Material	\$5716.64	
Developing expense	6362.20	
Operating expense	3015.01	17584.92
General expense	<u>2491.07</u>	\$34257.37

SUPPLEMENTARY.

JAMES A. SMITH ET AL., ETC.

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Expenditures by Solley & Johnson.

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Voucher No.	Date	TO WHOM PAID.	DESCRIPTION.	JAMES SMITH				SUSANNAH SMITH			
				Material	Developing Expense	Operating Expense	General Expense	Material	Developing Expense	Operating Expense	General Expense
	(1908)		Brought forward	\$4793.15	\$6513.32	\$3279.81	\$2122.17	\$5716.64	\$6362.20	\$3015.01	\$2491.07
1387	7/31	LeMay-Johnson L. Co.	Lumber for house					196.76			
1508	6/30	Turner & Solley	1-100 bbl. tank					60.00			
1604	7/30	C. L. Palmer	Foreman			15.62				15.62	
1605	7/30	Claude Sutherland	Pumping			20.00				20.00	
1606	7/30	A. Morrison	Rousting			1.26				1.26	
1608	7/30	P. A. Cooley	Pulling rods			2.50				1.25	
1609	7/30	National Supply Co.	Repairs and supplies			1.60				1.59	
1610	7/30	Jarecki Mfg. Co.	Supplies			2.48				2.48	
1611	7/30	W. K. Woods	Printed Envelopes				.79				.79
1612	7/30	Franklin O & G Co.	Office expense				5.72				5.72
				\$4793.15	\$6513.32	\$3323.16	\$2139.11	\$5973.40	\$6362.20	\$3057.11	\$2508.02
			Deduce errors in footings				1632.55		(Add)	19.36	1651.64
				4793.15	6513.32	3323.16	506.56	5973.40	6362.20	3076.47	856.38
					x920.00	-920.00			x684.00	-684.00	
			Items in wrong column	x719.32	7433.32						
					-719.32						
			Correct footings their statement without any deductions	5512.47	6714.00	2403.16	506.56	5973.40	7046.20	2392.47	856.38

x add
- less

Master's Report.

RECAPITULATION:

JAMES SMITH:

Material, \$5512.47
 Developing expense 6714.00
 Operating expense 2403.16
 General Expense 506.66

\$15136.19

SUSANNAH SMITH:

Material, \$5973.40
 Developing expense 7046.20
 Operating expense 2392.47
 General expense 856.39

\$31404.64

x10.55	586.39	9.42	2.38	314.95	1501.40	9.43	2.38
5523.02	6127.61	2393.74	504.18	5658.45	5544.80	2383.04	854.00

Further deductions (See admissions Hearing 12-14-10)

FINAL-RECAPITULATION.

Grand Total

\$28988.84

197 Cross-examination by Mr. LOWE:

Q. I will ask you when you commenced keeping the books.

A. August, 1909.

Mr. LOWE: That's all.

Testimony of W. Hennig.

Mr. WALTER HENNIG, one of the defendants, being first duly sworn, was examined in chief by Mr. Hindman, and testified as follows:

Q. Your name is Walter Hennig?

A. Yes sir.

Q. One of the defendants in this case?

A. Yes sir.

Q. You may state whether or not you have ever engaged in the oil business, the production of oil.

A. If I ever have?

Q. Yes sir.

A. Yes sir.

Q. How long have you been engaged in that business?

A. About thirty years.

Q. You may state whether or not, Mr. Hennig, you personally conducted the negotiations for the purchase of the leases on the Smith farms.

Mr. LOWE: Now, Mr. Master, we object to that.

The MASTER: I think that is covered pretty well.

Q. You may state whether or not there had been some development upon these farms at the time you purchased the leases.

Mr. LOWE: We object to that. That has been testified to.

The MASTER: It has been testified that somebody had bored a dry hole. I think that is enough.

Mr. HINDMAN: Very well.

Q. What development did you make upon these premises after you procured the lease?

Mr. TROUP: Now, if the court please, we object to that, because the evidence shows here what was done, what has been done.

The MASTER: I don't really see the object of these things.

Mr. HINDMAN: I want to show that these things were necessary to develop the property properly.

The MASTER: You mean these expenses?

198 Mr. HINDMAN: Yes, sir. I am going to show that the wells were dug, and that these things were incident to it.

Mr. LOWE: The record already shows that so many wells were dug.

Mr. TROUP: All right go ahead.

(Question is read.)

A. We drilled six wells on the Susannah Smith, and six wells on the James A. Smith.

Q. Now, I will ask you whether in the proper development of the premises it was necessary to drill these wells?

Mr. TROUP: Now, wait. We object to that now, because these people were in the position of a wrong-doer, and it isn't upon them to show whether it was proper or improper. They were in there as trespassers, and it isn't upon them to show what was proper or otherwise.

A. Yes.

The MASTER: He may answer.

Exception by complainants.

A. Yes.

Q. You may examine this exhibit, marked "A-1" (handing paper to witness), if you are not already familiar with the items and state whether or not the items of expenditure therein enumerated were necessary in the proper development, and the production of oil therefrom upon those premises?

Mr. LOWE: To that we object—incompetent, irrelevant and immaterial.

(Question is read.)

A. In my judgment they were.

Mr. LOWE: Now, we object.

The MASTER: Well, if they want it in, he may answer.

Exception by complainants.

(Answer is read.)

Q. You may state whether the expenditures indicated in that exhibit were made in the development of those premises, and the production of oil therefrom.

A. They were.

Mr. HINDMAN: I think that's all.

Cross-examination by Mr. LOWE:

Q. Do you know about these different expenditures?

A. Yes, I had charge of the property.

Q. You were present all the time and made the payments?

499 A. I was present all the time and made the payments?

Q. Yes, that is my question.

A. Well, no, I wasn't present all the time, and made the payments. I saw these bills, and saw that the vouchers were made and signed by Mr. Solley, and delivered. Mr. Solley signed the checks.

Q. Did you have the work done?

A. Yes sir.

Q. Saw it done?

A. Yes sir.

Q. Purchased the materials?

A. Yes sir.

Q. All of them?

A. Well, now, Judge, you aren't trying to trip me by saying I didn't buy shingle nails—I bought the stuff, yes. There might have been a shovel bought, or something like that, but I had actual charge of the property, and saw that the bills were paid. There might have been a few little things bought in town there that I didn't actually buy, but then I had charge of the whole thing.

Mr. LOWE: That's all.

(And here the defendants rested their case.)

Stipulation.

In the Circuit Court of the United States for the Eastern District of Illinois.

No. 330.

JOSEPH F. GUFFEY et al.

VS.

JAMES A. SMITH et al.

No. 331.

JOSEPH F. GUFFEY et al.

VS.

SUSANNAH SMITH et al.

It is stipulated and agreed between counsel for the Complainants and counsel for the Defendants, in both the above entitled causes, that the testimony of witnesses examined at the office of Messrs. Solley and Johnson, #503 Wright Building, City of St. Louis, State of Missouri, be taken by agreement in said City, outside of the Eastern District of Illinois, at Ten A. M., on the 14th day of December, 1910.

Present:

Messrs. A. L. Lowe, R. J. Dodds, Chas. Troup, A. E. Young, for the Complainants.

Messrs. J. A. Hindman and Abe Simmons, for the Defendants.

It is further stipulated and agreed by and between the respective parties, Complainants and Defendants, that the suit brought in the

Circuit Court of the County of Crawford, in the State of Illinois, during the September term, A. D. 1907, entitled E. N. Gillespie, Trustee, etc., vs. Susannah Smith et al., and a like suit at the same term of the same Court entitled E. N. Gillespie, Trustee, etc., vs. James A. Smith, et al., respectively, are the suits between the same parties and concerning the same subject matter as the matters in litigation in the two causes in which the testimony is now being taken herein.

It is further stipulated and agreed that the defendants, J. W. Solley, C. F. Johnson and Walter Hennig, were each personally served with summons in both of said causes of E. N. Gillespie, Trustee, etc., vs. Susannah Smith et al., and E. N. Gillespie, Trustee, etc., vs. James A. Smith et al., on the first day of August, A. D. 1907, by the Sheriff of the County of Clark, in the State of Illinois.

It is further stipulated and agreed that the said two causes in the said Crawford County Circuit Court *was each* dismissed in said Court before the two causes now pending in the Federal Court for the Eastern District of Illinois, in which this testimony is now being taken *was* brought in said United States Court.

It is further stipulated and agreed between the respective parties, Complainants and Defendants, in the above causes, that the correct footings and recapitulation on the last page of Exhibit, "A-1" introduced in evidence by the Defendants, Messrs. Solley, Johnson and Henning, in these causes on the seventeenth day of August, 1910, should be and are as follows:

501

Recapitulation.

James Smith:

Material	\$5,512.47	
Developing Exp.	6,714.00	
Operating Expense	2,403.16	
General Expense	506.56	
	<hr/>	15,136.19

Susannah Smith:

Material	5,973.40	
Developing Exp.	7,046.20	
Operating Expense	2,392.47	
General Expense	856.38	
	<hr/>	16,268.45

Grand Total \$31,404.64

The following items were charged in the wrong column, and the following changes made to correct, namely:

Charge Susannah Smith Developing Expense and credit Susannah Smith Operating Expense,

Voucher #1149.....	\$475.00	
" 1178.....	209.00	
		<u>\$684.00</u>

Charge James Smith Developing Expense and credit James Smith

Operating Expense,

Voucher #1201.....	\$710.00	
" 1334.....	210.00	
		<u>\$920.00</u>

Charge James Smith Material and credit James Smith Developing Expense,

Voucher #1538.....	\$719.32
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It is further stipulated and agreed between the parties, Complainants and Defendants, that Exhibit "A" Special is here now admitted in evidence.

It is further stipulated that if the oral testimony of the witness J. L. Cook should not correspond with the written statement, Exhibit "A" Special, that the written facts in said Exhibit "A" Special shall prevail over the oral testimony of the said witness J. L. Cook.

It is agreed that voucher #1050, as appears in Exhibit "A"-1, and designated on said statement as Mrs. Susannah Smith, bonus, represents an item embraced within the lease owned by the defendants, providing for the payment of a bonus under certain conditions therein embraced, and that a note has been given by the defendants, Messrs. Solley and Johnson to Mrs. Susannah Smith, for the amount thereof, and that said note is past due and unpaid.

It is agreed between the parties hereto that there should be deducted from the grand total as shown by Exhibit "A"-1, introduced in evidence the following amounts and items, namely:

Voucher #1001.....	.88	
" 1006.....	4.04	
" 1039.....	5.00	
" 1048.....	2.13	
" 1075.....	18.86	
" 1090.....	1,293.00	
" 1123.....	40.10	
" 1176.....	3.88	
" 1231.....	29.58	
" 1276.....	1.05	
" 1320.....	210.00	
" 1359.....	1.56	
" 1377.....	4.40	
" 1406.....	27.71	
" 1538.....	14.39	
" 1529.....	9.81	
		<u>\$1,666.39</u>

It is further agreed that from the grand total aforesaid there should be deducted the further sum of.....		817.60
Received from the Du Pont Powder Company for damages done to well Susannah Smith #1. After deducting the above amounts to-wit, the sum of \$2,483,999 from the grand total aforesaid, to the balance should be added the following:		
Voucher #1017.....	\$3.77	
“ #1526.....	64.42	
Total.....		\$68.19

making a net deduction from the grand total aforesaid \$2,415.80, and when so corrected the recapitulation of Exhibit "A"-1 shall be as follows:

James Smith:

Material	5,523.02	
Developing Expense	6,127.61	
Operating Expense	2,393.74	
General Expense	504.18	
		<u>\$14,548.55</u>

503 Susannah Smith:

Material,	5,658.45	
Developing Expense,	5,544.80	
Operating Expense,	2,383.04	
General Expense,	854.00	
		<u>14,440.29</u>

Grand Total.....28,988.84

It is further stipulated that the grand total so corrected as aforesaid includes an item of \$450.00 as shown by voucher #1050, purporting to be the amount of bonus paid by the defendants to Susannah Smith under the terms of the lease held by them, for which amount the defendants have executed their promissory note which is not past due and unpaid, to which said claim of \$450.00 the Complainants especially objects for the reason that said note was given as evidence of a personal debt of the payors in said note, and is a personal obligation of said payors, and is wholly immaterial and irrelevant in this suit, and the further objection that said note not having been paid cannot be taken into account as a credit to said defendants in said statements.

It is admitted as a matter of fact that the defendants, Messrs. Solley, Johnson and Hennig, since they have been in possession of the premises in controversy sold Gas for the purpose of operating an adjoining premises \$387.50, and for the purpose of operating upon the premises in controversy they used Gas of the value of \$432.50.

It is further stipulated and agreed that the amount above named is the value of the Gas used on the premises in controversy is included in and considered a part of the cost of constructing the wells upon the premises in controversy, as shown by Exhibit "A" 1.

The complainants here now offer in evidence Exhibit "B" Special, which is for the purpose of showing which of the items on Exhibit "A" 1 of the defendants have been derived by method of apportionment described in testimony heretofore given in these causes by Mr. Weekley.

Each party here rests *their* case.

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Master's Report.

Plaintants' Exhibit "H." 670

Memo. of Vouchers arbitrarily apportioned between Smith farms and other property operated by Solley & Johnson, as they appear on their statement of Aug. 17, 1910/

JAMES SMITH					SUSANNAH SMITH.				
Vehr. No.	Material	Develop'g Expense	Opr. Exp.	Gen. Exp.	Material	Develop'g Expense	Opr. Exp.	Gen. Exp.	
1. 1009			16.72				16.72		
1013			2.82				2.82		
1014			4.34				4.34		
1015			8.04				8.04		
1016			2.47				2.47		
1033			19.17				19.17		
1034		19.05	19.05			19.05	19.05		
1036		7.80	10.77			7.80	10.77		
1038			18.58				18.58		
1049			11.15				11.15		
1052		11.43	11.43			11.43	11.43		
1061		6.19	11.14			6.19	11.14		
1062			18.58				18.58		
1063			2.86				2.86		
1064			2.02				2.02		
1067			18.96	1.73			18.96	1.73	
1071		11.43	11.43			11.43	11.43		
1072			2.86				2.86		
1073			18.58				18.58		
1074			18.58				18.58		
1085				9.14				9.14	
1087	11.42				11.42				
1091		12.14	12.14			12.14	12.14		
1092		1.20	3.00			1.20	3.00		
1097			2.86				2.86		
1098			18.58				18.58		
1099			4.20				4.20		
1100			14.40				14.40		
2. 1086	50.58				50.58				
1102		7.80	8.40			7.80	8.40		
1109				8.86				8.86	
1135			18.58				18.58		
1136			1.86				1.86		
1137		7.43	8.05			7.43	8.05		
1139		1.28	1.28			1.28	1.28		
1140			5.72				5.72		
1146			18.58				18.58		
1150			2.86				2.86		
1151			9.38				9.38		
1152			3.59				3.59		
1153			11.58				11.58		
1154			5.39				5.39		
1155			2.58				2.58		
1156			1.10				1.10		
1158			2.10				2.10		
1159			1.30				1.30		
1160		2.10				4.19			
1061		2.10				2.00			
1162							2.10		
1166		1.43				1.43			
1168		1.43				1.43			
1172							10.00		

Complainant's Exhibit "B."

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1173			11.84			2.10	Complainant's
1179		13.00				13.00	Exhibit "
1184					12.00		
1185					12.00		
1186					10.28		
1187					12.00		
1189		16.00					
	62.00	108.81	400.08	31.57	62.00	141.17	414.28 31.57
			(2)				
	62.00	108.81	400.08	31.57	62.00	141.17	414.28 31.57
71							
-1190		5.57				5.57	
1191		4.18				4.18	
1192		18.58				18.58	
1193		5.81				5.81	
1194		2.82				2.82	
1195		3.72				3.72	
1196	.62	4.34			.62	4.34	
1197	.62	4.34			.62	4.34	
1198			1.72				1.72
1199			9.04		2.50	12.50	9.04
1212		5.72				5.72	
1213		2.86				2.86	
1214		13.92				13.92	
1215		4.80				4.80	
1216		18.58				18.58	
1217						1.04	
1220						3.15	
1221						2.50	
1223			8.86				8.86
1224		2.10				2.10	
1225		2.40				2.40	
1232		6.00				6.00	
1234		2.50				2.50	
1235		4.28				4.28	
1236		9.70				9.70	
1237		7.48				7.48	
1238		5.40				5.40	
1239	2.00	1.50			2.00	1.50	
1240		8.40				8.40	
1244		5.79				5.79	
1253					10.00		
1254						2.50	
1256		12.81				12.81	
1257	1.28	1.28			1.28	1.28	
1258	.68	2.08			.68	2.08	
1259		4.48				4.48	
1260	1.28	9.96			1.28	9.96	
1261		1.28				1.28	
1262		14.08				14.08	
1263		4.28				4.28	
1266			8.86			8.86	
1267			1.43				1.43
1270		11.88				11.88	
1272		8.98				8.98	
1273			9.70				9.70
1274			.28				.28
1275			5.30				5.30

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*Master's Report.*Complainants'
Exhibit "B."

1278		3.13				3.13
1279		4.28				4.28
1280		9.59				9.59
1281		9.59				9.59
1282		2.10				2.10
1283		4.52				4.52
1284	1.80	6.60			1.80	6.60
1285		5.72				5.72
1286					15.00	
1287		.57				.57
1290	2.50					
1291	40.00					
1292		7.14				7.14
1293		1.86				1.86
1294		5.00				7.50
1295		15.48				15.48
1296		18.58				18.58
1297		1.24				1.24
1298	.62	2.48			.62	2.48
1299	1.54	5.26			1.54	5.26
1300	1.86	5.57			1.86	5.57
1301	6.00			3.00		
1302			.50			
1303			9.14			
1307		7.14				7.14
1308		18.58				18.58
	68.00	163.61	756.41	86.40	65.00	180.97
672						803.66
	68.00	163.61	756.41	86.40	65.00	180.97
3. 1309		14.19				14.19
1310		11.38				11.38
1311		6.00				6.00
1312		4.80				4.80
1313	1.50	3.00			1.50	3.00
1314	1.20	2.10			1.20	2.10
1315		2.10				
1315						
1316		5.00				2.50
1317	5.00					
1318						2.80
1319			9.14			
4. 1322		5.88				5.88
1323			2.86			
1325		11.14				11.14
1326		11.76				11.76
1327		7.14				7.14
1328		1.86				1.86
1329		4.34				4.34
1330		1.86				1.86
1331		11.14				11.14
1332		4.95				4.95
1333		5.00				5.00
1337			8.52			
1341				.50		
1341a		7.14				7.14
1342		18.86				18.86
1343		8.52				8.52
1344		18.06				18.06
1345						5.00
1346		1.67				7.50
1347		5.00				2.50

Complainant's Exhibit "B."

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1348		.72				.72			Complainant's Exhibit
1355			8.58			8.58			
1358	2.28			2.28					
1360		.30				.30			
1361			.57					57	
1364				2.25					
1365		5.14				5.14			
1366	21.25	10.00				6.25	5.00		
1367	5.00					5.00			
1368	10.00								
1369	5.00								
1370		6.30							
1371	4.86	3.04				4.86	3.04		
1372		20.00					20.00		
1373		21.68					21.68		
1374			10.28					10.28	
1376	2.18			2.18					
1379		1.83				1.83			
1381			3.43					3.43	
1383	3.46	5.97				3.46	5.97		
1384		21.43					21.43		
1385		20.00					20.00		
1387	2.50					1.25			
1388	6.25	7.50				28.75	5.00		
1389	5.00					15.00			
1390	5.00								
1391	5.00								
1393	8.00			2.50					
1394		2.00							
1395		2.24					2.24		
1397				1.00					
1397			.57					.57	
1398			8.86					8.86	
1407		11.79					11.79		
1408		20.00					20.00		
1409	1.22	1.22				1.22	1.22		
1410						1.25			
1412							1.67		
1415			.36					.36	
1416			1.72					1.72	
5-1419		2.30					2.30		
1420			8.57					8.57	
1425		22.81					22.81		
673	78.18	249.96	1113.83	149.92	125.21	252.54	1161.67	132.48	
5.1426	78.18	249.96	1113.83	149.92	125.21	252.54	1161.67	132.48	
1427			20.00				20.00		
1428							4.40		
1429							10.00		
1430		2.50					2.50		
1430			8.57					8.57	
1430		21.43					21.43		
1440		20.00					20.00		
1441		3.64					3.64		
1442							7.50		
1445			8.86					8.86	
1445		8.53					8.53		
1449			.43					.43	
1451		22.13					22.13		
1452		20.00					20.00		
1453		2.44					2.44		

Master's Report.

Complainants'
Exhibit "B."

1454	5.00				5.00	
1458		8.57				8.57
1461	22.54				22.54	
1462	20.00				20.00	
1463	18.86				18.86	
1464	5.00				5.00	
1465	.57				.57	
1466	1.40				1.40	
1468		8.90				8.90
1471	21.43				21.43	
1472	20.00				20.00	
1473					2.13	
1474					2.13	
1475					5.00	
1476					2.50	
1479		8.62				8.62
1480	20.00				20.00	
1479a	22.28				22.28	
1481	3.77				3.77	
1483				5.00		
1484	1.42				1.42	
1485				5.00	2.50	
1486	6.75				7.50	
1487			3.00			
1467	7.40				7.40	
1478	4.08				4.08	
1488	42.76		42.76			
1489		9.04				9.04
1490	22.00				22.00	
1491	20.00				20.00	
1492	3.65				3.65	
1493					10.00	
1494	2.50			2.50	5.00	
1497			3.20			
1498		8.86				8.86
1500	22.42				22.42	
1501	20.00				20.00	
1502					2.20	
1503					.84	
1504					1.10	
1505	1.67				5.42	
1506				3.00		
1507	11.83				11.83	
1511		9.32				9.32
1512	21.42				21.42	
1513	20.00				20.00	
1514	3.65				3.65	
1515	1.42			1.42		
1516	1.42			1.42		
1517	1.42			1.42		
1518	5.00					
1519		4.63			2.13	
1521			8.62			8.62
1523	51.94		51.94			
1525		22.94			22.94	
1526		20.00			20.00	
1528	10.00	7.50				
1529		7.50				
1530	15.00					
	172.88	284.22	1626.71	229.71	226.11	272.70
						1714.35
						212.27

Complainant's Exhibit "B."

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172.88	284.22	1626.71	229.71	226.11	272.30	1714.35	212.27	Complainant's Exhibit "B."
			8.72				8.72	
		13.90				13.90		
		20.00				20.00		
		3.58				3.58		
			8.58				8.58	
		1.50						
		20.00				20.00		
		3.78				3.78		
		1.26				1.26		
		1.88				1.88		
		9.33				9.33		
		.42				.42		
		.28				.28		
			8.57				8.57	
			.57				.57	
		14.62				14.62		
		20.00				20.00		
		.68				.68		
		6.98				6.98		
			8.57				8.57	
		14.47				14.47		
		20.00				20.00		
		5.34				5.34		
						1.10		
		.62				.62		
		.58				.58		
		5.00				2.50		
			8.57				8.57	
		24.00				24.00		
		14.48				14.48		
			38.99				38.99	
						1.25		
			5.72				5.72	
		14.62				14.62		
		14.66				14.66		
		3.75				6.25		
						2.50		
		7.51				7.51		
			5.72				5.72	
			.54				.54	
		20.00				20.00		
		14.74				14.74		
						1.25		
		3.76				3.76		
			5.72				5.72	
		15.06				15.06		
		20.00				20.00		
		.62					.62	
		2.50				3.75		
		2.05				2.05		
			5.72				5.72	
		14.80				14.80		
		20.00				20.00		
		.94				.94		
		2.50				5.00		
		8.88.				8.88		
			5.72				5.72	
		14.70				14.70		

Master's Report.

Debitants'	1598	20.00				20.00	
Exhibit "B."	1599					2.50	
	1601		3.28				3.28
	1602		5.72				5.72
7. 1604	15.52					15.52	
	1605	20.00				20.00	
	1606	1.26				1.26	
	1608	2.50				1.25	
	1609	1.59				1.59	
	1610	2.48				2.48	
	1611		.79				.79
	1612		5.72				5.72

172.88	284.22	2073.85	356.93	226.11	272.30	2170.47	340.11
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Total J. Smith 2887.88

Total S. Smith \$3008.99

Grand Total \$5896.87

Complainant's Exhibit "B."

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675 STATEMENT OF OIL PURCHASED BY THE OHIO OIL COMPANY FROM SOLLEY, JOHNSON ET AL
TANKS OF THE SUSANNAH AND JAS. A. SMITH FARMS, LOCATED IN SECTION 11, LICKING
TOWNSHIP, CRAWFORD COUNTY, ILL., FROM APRIL 22nd, 1907, to AUGUST 10th, 1910.

J. W. SOLLEY, ACCOUNT.

Date Cashd	From Susannah Smith Farm				From Jas. A. Smith Farm			Payments to J. W. Solley.		Amount of Credits on Bkls. O. O. Co
	Steam Earnings	Bbls. of Oil	Price	Proceeds Oil & Steam	Earnings	Bbls. of Oil	Proceeds Oil & Steam	Amt. of Check	Date Paid	
1907									1907	
Apr 27	\$ 3.50	288.64	68c	\$206.67				\$206.67	Apr 27	
May 27	11.18	932.97	"	645.60				645.60	May 27	
May 31	1.84	153.30	"	106.08				106.08	May 31	
Jun 28	13.63	1136.86	"	786.69				786.69	Jun 28	
Jul 29	19.26	1606.39	"	1111.95				1111.95	Jul 29	
Aug 2	5.60	466.55	"	322.85				322.85	Aug 2	
Aug 27	23.35	1948.45	"	1348.30	4.27	354.62	245.41	1593.71	Aug 27	
Sep 3	8.08	673.23	"	465.88	3.59	299.65	207.35	673.23	Sep 3	
Sep 17	10.08	891.13	"	616.65	6.32	526.15	364.10	930.75	Sep 17	
Dec 2	15.90	1327.34	"	918.49	5.72	477.21	330.22	1248.71	Dec 7	
7	39.83	3321.20	"	2298.25	19.95	1662.03	1150.13	3448.38	7	
1908.									1908.	
Jan 8	5.11	426.22	"	294.94	.93	77.76	53.81	348.75	Jan 8	
Feb 3	5.08	422.70	"	292.52	—	—	—	292.52	Feb 3	
Mar 3	9.90	75.09	"	51.96	—	—	—	51.96	Mar 3	
Jan 8	5.08	424.06	60c	289.52	2.91	244.28	149.48	408.99	Jan 8	
Feb 3	7.93	661.13	"	404.61	6.18	516.71	316.21	720.81	Feb 3	
Mar 3	5.29	441.47	"	270.17	3.48	289.88	177.41	447.88	Mar 3	
May 1	9.61	802.59	"	491.16	6.03	502.92	307.78	798.95	Jun 12	
Jun 2	14.77	1234.36	"	755.39	4.17	347.14	212.45	987.84	Jun 12	
Jun 12	28.88	2408.43	"	1473.94	14.40	1200.76	734.96	2208.79	Jun 12	
Jul 20	12.77	1067.26	"	653.13	7.79	648.93	397.15	1050.27	Jul 20	
Aug 3	5.24	437.14	"	267.52	3.14	258.94	158.50	428.03	Aug 3	
Sep 3	8.10	676.38	"	413.93	6.18	514.80	315.06	728.99	Sep 3	
Oct 2	9.06	752.10	"	460.31	9.23	769.31	470.91	931.13	Oct 2	

Master's Report.

[illegible]

CHAS. F. JOHNSON ACCOUNT.

Complainant's Exhibit "B."

Date Cashd	From Susannah Smith Farm				From Jas. A Smith Farm			Payments to Chas. F. Johnson		Amount of Credits on Bks. O. O. Co.
	Steam Earnings	Barrels of Oil	Price	Proceeds Oil & Steam	Steam Earnings	Barrels of Oil	Proceeds Oil & Steam	Amt. of Check	Date Paid	
1907.										
Apr. 27	\$ 3.59	298.66	68c	\$206.68				\$206.68	1907 Apr 27	
May 31	11.22	933.01	"	645.67				645.67	May 31	
Jun 28	1.84	153.30	"	106.08				106.08	"	
Jul 29	13.65	1136.86	"	786.71				786.71	Jun 28	
Aug 2	19.29	1606.95	"	1112.02				1112.02	Jul 29	
Sep 3	5.61	466.56	"	322.87				322.87	Aug 2	
Oct 17	31.49	2621.76	"	1814.29	\$ 7.85	654.31	452.78	3267.07	Sep 3	
Nov 17	10.72	891.15	"	616.70	6.31	626.17	364.11	980.81	Oct 17	
Dec 2	15.94	1327.42	"	918.59	5.74	477.28	330.29	1248.88	Dec 7	
Dec 7	39.86	3321.29	"	2298.34	19.94	1662.09	1150.16	3448.50	Dec 7	
1908.										
Jan 4	8.46	704.05	"	487.21	.93	77.76	53.81	541.02	1908 Jan 4	
Feb 3	1.74	144.90	"	100.27	—	—	—	100.27	Feb 3	
Mar 17	7.90	75.09	"	51.96	—	—	—	51.96	Mar 17	
Jan 4	5.10	424.07	60c	259.54	2.95	244.30	149.53	409.07	Jan 4	
Feb 3	7.94	661.14	"	404.62	6.21	516.74	316.25	720.88	Feb 3	
Mar 17	5.31	441.50	"	270.21	3.48	289.88	177.41	447.62	Mar 17	
May 1	4.83	401.30	"	245.62	3.02	251.48	153.91	399.52	May 1	
Jun 2	7.43	617.22	"	377.76	2.08	173.88	106.23	483.99	Jun 2	
Jul 1	6.60	549.76	"	336.46	3.14	261.39	169.97	496.43	Jul 1	
Aug 3	7.82	654.47	"	400.50	4.05	339.00	207.45	607.95	Aug 13	
Sep 2	6.39	533.65	"	326.58	3.87	324.48	198.56	525.14	Sep 2	
Oct 2	2.61	218.57	"	133.75	1.55	129.45	79.23	212.98	Oct 2	
Nov. 2	4.04	338.18	"	206.95	3.09	257.36	157.51	364.45	Nov. 2	
Dec 1	4.51	376.05	"	280.14	4.61	384.63	235.39	465.53	Dec 1	

Master's Report.

1909.	1910.	Aug 13	366.06	172.09	282.19	3.38	193.36	"	315.94	3.80
Jan 2	Jan 3	Aug 13	104.80	30.52	362.05	4.21	65.28	"	341.12	4.09
Feb 1	Feb 1			175.92			143.48	"		
Mar 2	Mar 2			171.36	280.00	3.36	298.03	"	487.70	5.41
Apr 1	Apr 1			187.36	280.00	3.66	171.10	"	379.57	3.36
May 1	May 1			217.78	355.89	4.25	205.65	"	336.07	4.01
Jun 1	Jun 1			238.14	389.16	4.04	241.07	"	393.94	4.71
25	25			167.17	373.17	3.27	206.12	"	336.82	4.03
Jul 1	Jul 1			41.99	72.15	.87	—	57c	—	—
16	16			104.07	178.83	2.14	58.30	"	100.15	1.21
Aug 2	Aug 2			69.80	108.33	1.30	77.82	54c	140.97	1.70
Sep 1	Sep 1			119.61	216.68	2.60	112.07	"	203.03	2.43
1	1			119.77	216.99	2.60	100.03	"	181.24	2.16
Oct. 21	Oct. 21			82.04	148.63	1.78	81.36	"	147.38	1.77
Nov 1	Nov 1			19.84	37.28	.45	19.08	52c	35.87	.43
Dec 1	Dec 1			57.35	107.80	1.29	57.95	"	108.92	1.31
1910.	1910.									
Jan 3	Jan 3			75.27	141.49	1.69	75.41	"	141.74	1.71
Feb 1	Feb 1			78.96	139.00	1.68	72.36	"	136.01	1.65
Mar 1	Mar 1			145.21	272.96	3.27	141.25	"	266.65	3.19
Apr 1	Apr 1			53.60	100.75	1.21	52.69	"	99.05	1.18
May 2	May 2			72.47	136.23	1.63	73.21	"	137.62	1.65
Jun 1	Jun 1			97.11	182.54	2.19	97.55	"	183.89	2.19
Jul 1	Jul 1			137.32	258.09	3.11	137.21	"	257.94	3.08
Aug 1	Aug 1			98.69	185.33	2.22	97.38	"	183.05	2.19
Total	Total									
Cashed	Cashed		17422.96	7020.63	11311.61	135.63	15437.88		23711.08	284.13
Balance	Balance									
Uncashed	Uncashed									
Aug 10	Aug 10			254.14	477.74	5.72	240.62	"	452.25	5.45
GRAND	GRAND									
TOTAL	TOTAL			11789.35	141.35	15678.35	15678.50		24163.33	289.58

Complainant's Exhibit "B."

677 STATEMENT OF OIL PURCHASED BY THE OHIO OIL COMPANY FROM SOLLEY, JOHNSON ET AL
TANKS OF THE SUSANNAH AND JAS. A. SMITH FARMS, LOCATED IN SECTION 11, LICKING
TOWNSHIP, CRAWFORD COUNTY, ILL., FROM APRIL 22nd, 1907, to AUGUST 10th, 1910.

WALTER HENNIG No. 2 ACCOUNT.

Date Cashd	From Susannah Smith Farm				From Jas. A. Smith Farm		Payments to Walter Hennig		Amount of Credits on Bbbs. O. O. Co.
	Steam Earnings	Bbbs. of Oil	Price	Proceeds Oil & Steam	Earnings	Bbbs. of Oil	Proceeds Oil & Steam	Amt. of Check	Date Paid
1908.									
May 12	\$ 4.82	401.31	60c	245.60	3.02	251.48	153.91	399.51	1908 May 12
May 13	16.56	1382.76	"	846.31	6.15	513.58	314.30	980.43	May 13
May 18	1.52	126.47	"	76.80	.84	70.50	43.14	300.12	May 18
Jun 2	3.79	312.53	"	191.31	2.29	190.62	116.62	307.97	Jun 2
Jun 18	5.44	285.37	"	174.66	2.49	206.34	126.29	300.96	Jun 18
Jul 3	2.99	248.26	"	151.95	1.43	118.16	73.33	224.27	Jul 3
Jul 18	1.82	68.72	"	42.05	1.30	109.67	67.10	109.15	Jul 18
Aug 3	1.81	149.86	"	91.73	.23	19.80	12.11	103.84	Aug 3
Aug 18	2.04	168.11	"	102.91	1.10	91.34	55.90	158.81	Aug 18
Sep 2	2.05	170.11	"	104.12	1.99	166.07	101.63	205.75	Sep 2
Sep 17	2.93	244.89	"	149.86	2.50	209.03	127.92	277.78	Sep 17
Oct 2	1.57	131.18	"	80.28	2.11	175.65	107.80	187.78	Oct 2
Oct 17	1.63	136.68	"	83.64	1.68	138.78	84.95	168.59	Oct 17
Nov 2	2.15	179.23	"	109.69	1.73	143.43	87.79	197.43	Nov 2
Nov 17	3.77	64.58	"	36.52	1.29	106.68	65.30	104.82	Nov 17
Dec 2	3.32	276.59	"	169.27	2.95	245.38	180.18	319.45	Dec 2
Dec 16	.78	64.95	"	39.75	—	—	—	39.75	Dec 16
1909.									1909.
Jan 2	4.65	422.75	"	258.30	3.38	279.98	171.37	429.67	Jan 2
Jan 16	1.52	126.27	"	77.28	1.60	133.94	81.96	169.25	Jan 16
Feb 3	1.86	153.30	"	93.84	2.08	172.29	105.45	199.29	Feb 3
Mar 3	4.03	336.07	"	205.67	4.29	355.92	217.84	423.51	Mar 3
Apr 2	4.75	303.97	"	241.13	4.67	389.13	238.15	479.28	Apr 2
May 6	4.05	336.83	"	206.15	4.16	345.34	211.36	417.51	May 6
Jun 3	2.90	241.11	"	147.57	3.48	287.19	175.79	323.36	Jun 3

Master's Report.

Jul 6	203.03	57c	118.18	2.61	216.67	126.11	244.29	Jul 6	\$118.81
Aug 2	181.24	54c	100.06	2.61	217.01	119.80	219.86	Aug 2	
Sep 2	183.29	"	101.19	2.23	185.94	102.64	203.82	Sep 2	
Oct 4	108.93	"	60.12	1.30	107.80	59.51	119.03	Oct 4	
Nov 2	141.73	52c	75.39	1.70	149.40	75.27	150.66	Nov 2	
Dec 2	136.02	"	72.37	1.66	139.01	73.95	146.32	Dec 2	
Jan 6 1910.	262.10	"	130.46	3.27	272.97	145.21	284.68	Jan 6 1910.	
Feb 2	103.64	"	55.15	1.21	100.75	53.60	108.75	Feb 2	
Mar 3	137.62	"	73.21	1.65	136.21	72.43	145.69	Mar 3	
Apr 4	183.40	"	97.57	2.20	182.54	97.12	194.69	Apr 4	
May 4	257.96	"	137.23	3.11	256.11	137.33	274.56	May 4	
June 2	73.23	"	38.96	1.87	71.87	38.25	77.30	June 2	
Total	8303.00	"	4998.28	81.19	6750.67	3990.20	8988.48		
Aug 1	109.84	"	58.43	1.37	113.48	60.38			
Total Cash	8502.93		5056.71	82.55	6884.15	4050.58	8988.43		118.81
Balance Uncashed	452.22		240.58	5.73	477.73	254.15			494.73
GRAND TOTAL	8955.15		5297.29	88.28	7341.88	4304.73	8988.43		613.54

Complainant's Exhibit "B."

678 STATEMENT OF OIL PURCHASED BY THE OHIO OIL COMPANY FROM SOLLEY, JOHNSON ET AL
TANKS ON THE SUSANNAH AND JAS. A. SMITH FARMS, LOCATED IN SECTION 11, LICKING
TOWNSHIP, CRAWFORD CO., ILL., FROM APRIL 22nd, 1907, to AUGUST 10th, 1910.

M. ELLIS NO. 2 ACCOUNT.

Date Cashd	From Susannah Smith Farm				From Jas. A. Smith Farm			Payments to M. Ellis.		Amount of Credits on Bbks. O. O. Co
	Steam Earnings	Bbbs. of Oil	Price	Proceeds Oil & Steam	Steam Earnings	Bbbs. of Oil	Proceeds Oil & Steam	Amt. of Check	Date Paid	
1908.										
Oct 29	\$ 1.95	163.18	60c	\$99.86	\$ 1.94	162.90	\$99.68	199.54	1908 Oct. 29	
Dec 2	3.33	273.38	"	168.56	3.11	259.39	158.74	327.30	Dec 2	
1909.										
Jan 18	1.86	155.20	"	94.98	4.69	—	—	94.98	Jan 18	
Feb 20	3.98	258.34	"	217.78	4.69	390.77	239.15	456.94	Feb 20	
Apr 24	1.92	168.76	"	97.17	2.03	166.12	102.90	200.07	Apr 24	
May 3	3.95	327.96	"	200.73	3.96	321.83	201.11	401.83	May 3	
June 2	2.68	224.56	"	137.42	2.76	230.24	140.90	278.32	June 2	
Sep 1	1.92	160.75	"	98.37	2.28	191.45	117.15	215.32	Sep 1	
Oct 1	1.63	135.34	54c	74.71	1.72	144.46	79.73	154.44	Oct 1	
Nov 21	1.45	120.81	"	66.69	1.74	144.65	79.85	146.54	Nov 21	
Dec 2	2.92	242.43	"	133.83	2.93	242.52	133.89	267.72	Dec 2	
Dec 14	1.09	90.69	52c	24.91	1.11	92.67	25.34	50.25	Dec 14	
1910.										
Jan 3	.25	21.52	"	48.25	.27	21.96	11.69	23.13	Jan 3	
Jan 18	1.84	153.21	"	11.44	1.92	160.02	85.13	166.64	Jan 18	
Feb 2	.30	24.48	"	81.51	.25	20.79	11.06	24.09	Feb 2	
Mar 28	.53	44.60	"	13.03	.55	46.37	24.60	48.38	Mar 28	
Apr 4	1.10	91.75	"	22.23	1.09	90.81	48.31	97.12	Apr 4	
May 3	.88	73.01	"	48.81	.89	73.74	39.23	77.56	May 3	
May 4	.61	50.24	"	38.33	.57	47.94	23.50	52.23	May 4	
May 5	2.09	171.93	"	26.73	2.06	172.04	91.52	183.04	May 5	

Master's Report.

June 2 28 Aug 2	1.47 1.22 1.80	122.03 101.81 149.40	" " "	64.93 54.16 79.49	1.48 1.17 2.06	123.55 98.19 170.95	66.73 52.23 90.94	130.65 106.39 170.44	June 2 28 Aug 2
Total Cashied	41.33	3461.25		1906.93	41.16	3429.73	1973.74	3070.67	
Balance Uncashed									
Aug 10	.60	50.28		26.74	.59	49.36	26.26	3070.67	53.00
GRAND TOTAL	41.93	3511.53		2023.67	41.75	3479.09	2000.00	3070.67	53.00

STATEMENT OF OIL PURCHASED BY THE OHIO OIL COMPANY FROM SOLLEY, JOHNSON ET AL
TANKS ON SUSANNAH SMITH FARM, LOCATED IN SECTION 11, LICKING TOWNSHIP,
CRAWFORD COUNTY, ILLINOIS, FROM APRIL 22nd, 1907, to AUGUST 10th, 1910.

SUSANNAH SMITH ROYALTY ACCOUNT.

Date Cashed	Barrels of Oil	Price	Proceeds	Paid Susannah Smith	Date	Amount of Credit on Bkks. O. O. Co.
1907.					1907	
May 24	492.63	68c	334.99	334.99	May 24	
June 21	393.15	"	267.34	267.34	June 21	
July 23	676.22	"	391.83	391.83	July 23	
Aug 21	1083.53	"	723.20	723.20	Aug 21	
Sep 20	898.54	"	611.01	611.01	Sep 20	
Dec 2	350.07	"	238.05			
1908.						
Jan 2	796.63	"	541.04			
Feb 1	554.32	"	376.94			
Apr 2	108.01	"	73.45			
Mar 4	231.54	"	157.45			
May 1	30.03	"	20.42			
1908.						
Mar 4	169.63	60c	101.78			
Apr 2	264.44	"	158.66			
May 1	498.17	"	298.90			
June 2	493.17	"	298.90			
July 1	439.75	"	293.85			
Aug 3	523.61	"	314.17			
Sep 2	426.86	"	256.12			
Oct 2	174.86	"	104.92			
Nov 2	202.91	"	121.75			
Nov 11	434.21	"	290.53			
Dec 5	185.62	"	111.37			
1909						
Jan 5	292.62	"	175.57			
Feb 8	211.57	"	126.94			
Mar 6	176.57	"	106.00			
					1908.	
					Oct 12	1/24 Roy.
					Nov 2	796.76 Proceeds
					Dec 11	
					Dec 5	
					1909	
					Jan 5	
					Feb 8	
					Mar 6	

Master's Report.

Apr 6	238.38	"	143.03	143.03	Apr 6
May 3	181.16	"	108.70	108.70	May 3
June 3	144.66	"	86.80	86.80	June 3
July 2	121.80	57c	69.43	69.43	July 2
Aug 5	108.74	54c	58.72	58.72	Aug 5
Sep 7	109.95	"	59.37	59.37	Sep 7
Oct 5	65.36	"	35.29	35.29	Oct 5
Nov 4	108.80	52c	55.02	55.02	Nov 4
Dec 3	60.83	"	31.03	31.03	Dec 3
1910.					1910
Jan 4	157.26	"	81.78	81.78	Jan 4
Feb 4	84.72	"	44.05	44.05	Feb 4
Mar 4	80.92	"	42.08	42.08	Mar 4
Apr 4	89.13	"	46.35	46.35	Apr 4
May 3	154.78	"	80.49	80.49	May 3
June 4	106.82	"	57.11	57.11	June 4
July 5	114.04	"	59.30	59.30	July 5
Aug 4	134.77	"	70.08	70.08	Aug 4
Total Cashed	12049.88		7501.41	6764.65	796.76
Balance Uncashed					
Aug 10	1.04		.84		.54
GRAND TOTAL	12050.92		7501.95	6764.65	797.30

1/8 Roy.

JAMES A. SMITH ROYALTY ACCOUNT.

[illegible]

Master's Report.

Aug 4	130.30	54c	70.31	70.31	Aug 4		
2	111.55	"	60.24	60.24	2		
Sep 2	64.67	"	34.92	34.92	Sep 2		
Oct 2	84.90	52c	44.15	44.15	Oct 2		
Nov 3	83.39	"	43.36	43.36	Nov 3		
Dec 2					Dec 2		
1910.					1910.		
Jan 3	163.76	"	85.16	85.16	Jan 3		
Feb 2	60.45	"	31.43	31.43	Feb 2		
Mar 2	81.72	"	42.49	42.49	Mar 2		
28	88.49	"	46.01	46.01	28		
May 2	175.87	"	91.45	91.45	May 2		
Jun 2	111.19	"	57.82	57.82	Jun 2		
Jul 5	110.49	"	57.45	57.45	Jul 5		
Aug 2	131.73	"	68.50	68.50	Aug 2		
Total Cash							
Balance Uncashed	\$6413.58		\$3945.57	\$3486.61			\$358.86
Aug 10	65.92	"	36.00				36.00
GRAND TOTAL	6479.50		3981.47	3486.61			394.86

Complainant's Exhibit "B."

682 STATEMENT OF OIL PURCHASED BY THE OHIO OIL COMPANY
FROM SOLLEY, JOHNSON ET AL ON JAS. A. SMITH FARM,
LOCATED IN SECTION II, LICKING TOWNSHIP,
CRAWFORD COUNTY, ILLINOIS, FROM APRIL
22nd, 1907, to AUGUST 10th, 1910.

JAMES A. SMITH DISPUTED 1/24 ROYALTY HOLD ACCOUNT.

Date Cashd	Barrels of Oil	Price	Amount of Credits on Bks. O. O. Co.
1908.			
Nov 2	51.48	60c	30.89
Dec 1	76.93	"	46.16
1909.			
Jan 2	56.43	"	33.86
Feb 1	70.39	"	42.23
Mar 1	55.98	"	33.59
Apr 1	61.22	"	36.73
May 1	71.18	"	42.71
June 1	77.82	"	46.69
25	54.65	"	32.79
July 1	14.43	57c	8.23
16	35.77	"	20.39
Aug 2	21.66	54c	11.70
Sept 1	43.33	"	23.40
Oct. 1	43.38	"	23.43
21	29.73	"	16.05
Nov. 1	7.46	52c	3.88
Dec. 1	21.56	"	11.21
1910.			
Jan. 3	28.29	"	14.71
Feb. 1	27.79	"	14.45
Mar. 1	54.58	"	28.38
Apr. 1	20.15	"	10.48
May 2	27.23	"	14.16
June 1	36.50	"	18.98
July 1	51.61	"	26.84
Aug. 1	37.05	"	19.27
Total Cashd	1076.60		611.21
Balance Uncashed August 10th	95.54		49.68
GRAND TOTAL	1172.14		660.89

Master's Report.

681 STATEMENT OF OIL PURCHASED BY THE OHIO OIL COMPANY
FROM SOLLEY, JOHNSON ET AL ON JAS A. SMITH FARM,
LOCATED IN SECTION II, LICKING TOWNSHIP,
CRAWFORD COUNTY, ILLINOIS, FROM
APRIL, 22nd, 1907 to AUGUST 10th, 1910.

SUSANNAH SMITH DISPUTED 1/24 ROYALTY HOLD ACCOUNT.

Date Cashd	Barrels of Oil	Price	Amount of Credits on Bks. O. O. Co.
1908.			
Nov 2	67.63	60c	\$40.58
Dec 1	75.21	"	45.13
1909.			
Jan 2	63.18	"	37.91
Feb 1	68.22	"	40.93
Mar 1	97.51	"	58.51
Apr 1	55.90	"	33.54
May 1	67.19	"	40.31
June 1	78.78	"	47.27
25	67.36	"	40.42
July 16	20.03	57c	11.42
Aug 2	28.19	54c	15.22
Sep 1	40.59	"	21.92
Oct 1	36.24	"	19.57
21	29.48	"	15.92
Nov 1	7.17	52c	3.73
Dec 1	21.79	"	11.33
1910.			
Jan 3	28.35	"	14.74
Feb. 1	27.20	"	14.14
Mar. 1	53.32	"	27.73
Apr. 1	19.81	"	10.30
May 2	27.53	"	14.32
June 1	36.67	"	19.07
July 1	51.59	"	26.83
Aug 1	36.61	"	19.04
Total Cashd	1105.55		\$629.88
Balance Uncashed Aug 10	90.43		47.02
GRAND TOTAL	1195.98		\$676.90

525

Certificate of Master.

I, Walter T. Gunn, Master in Chancery, hereby certify that the foregoing certificate of evidence contains all the evidence offered by either party upon the hearing before me of this case, since its reference, and I further certify that I was personally present at the examination of each and every witness named therein, and that the same was taken in shorthand by Lela A. Oldknow and Maude Forrester, stenographers selected by me, who at my request reproduced the same in typewriting as above; and I further certify that the same accurately states the evidence given, and that the exhibits named therein were marked by me for identification, and permitted by me to be retained for better security by the solicitors who offered the same.

Dated this 28th day of December, A. D. 1910.

WALTER T. GUNN,
Master in Chancery.

526. UNITED STATES OF AMERICA:

In the Circuit Court of the United States for the Eastern District of Illinois.

No. 331.

JOSEPH F. GUFFEY, A. S. GUFFEY, E. N. GILLESPIE, and ROBERT Pitcairn, Jr., Copartners Trading as Guffey, Gillespie & Pitcairn,

vs.

JAMES A. SMITH, H. E. WILCOX, J. W. SOLLEY, C. F. JOHNSON, Walter Hennig, The Ohio Oil Company, a Corporation; Perry A. Little, and Lewis E. Willett.

Master's Report.

To the Honorable Francis M. Wright, Judge of said Court:

The undersigned Master in Chancery of said Court, to whom was re-referred the above entitled cause by orders entered therein, to take the proof and report of the same to the court, together with his conclusions of law and fact, respectfully reports:

That the said cause was set for hearing before the Master in Chancery on the 10th day of August, A. D. 1910, at Marshall, Illinois, and on the 17th day of August, A. D. 1910 at Danville, Illinois, and on the 14th day of December, A. D. 1910 at St. Louis, Missouri, and that testimony was taken on the several dates above, there appearing Messrs. Callahan, Jones & Lowe, Arthur E. Young, Charles Troup and R. R. Dodds, on behalf of the complainants; and Parker & Eagleton, Abram Simmons and J. A. Hindman, on behalf of the defendants.

That the solicitors for the complainants offered in evidence certain papers and instruments in writing hereinafter described, and caused to be sworn in complainants' behalf certain witnesses whose names appear in the stenographer's additional report of evidence attached hereto, duly certified and hereby made a part of this report. That the solicitors for the defendants offered in evidence their
527 certain papers and instruments in writing, and caused to be sworn in their behalf certain witnesses whose names are found in the stenographer's additional report of evidence, hereto attached, duly certified; all of which said exhibits and report of evidence are hereto attached and made a part of this report.

That having considered the additional evidence adduced upon the rehearing of this cause, both upon behalf of the complainants and of the defendants, and having heard the arguments of counsel, and being fully advised in the premises, the Master submits the following report to the court:

Statement.

The Master respectfully reports that this is a rehearing of the cause in which the Master made a report on the 24th day of December, A. D. 1909. That at the former hearing the complainants did not press their suit against the Ohio Oil Company, a defendant therein, and had stipulated that they would allow the accounting prayed for in the bill to be waived until the merits of the case had been passed upon by the court; but that after the report above referred to was filed, it was determined to have the case re-opened to take such evidence on such additional matters, and this additional report covers such matters.

Findings of Fact.

1. The Master finds that, so far as the questions involved upon the first hearing of this case is concerned, he adopts the report that he made and filed with the Clerk of this Court on the 24th day of December, A. D. 1909, with the exception of the finding with reference to the Ohio Oil Company in paragraph number 15 on page 12 of the original report, wherein it was recommended that the bill of complaint as to the Ohio Oil Company be dismissed, and in this supplemental report, on account of the additional evidence introduced herein, the Master recommends that the Ohio Oil Company be restrained as a defendant, and held liable to an accounting for the value of oil or gas received by it, as specified in this report, and amended findings (3) of the original report by adding after the words "valuable consideration" the following "viz. eleven (\$11.00) dollars."

528 2. The Master further finds that from the wells placed upon the property in question, oil was produced and conducted to the tanks of the Ohio Oil Company by means of a certain pipe line, and that the Ohio Oil Company purchased said oil and paid the defendants, J. W. Solley, C. F. Johnson and Walter Hen-

ing for certain portions of oil in the amounts hereinafter found, and paid certain other portions of the value of said oil to one M. Ellis, and also paid the royalty due to the owner of said real estate.

3. The Master further finds that the Ohio Oil Company, up to the 10th day of August, A. D. 1910, had received from the real estate of James A. Smith exclusive of the royalty due the said James A. Smith oil or oil products of the value of \$23,146.35.

4. The Master further finds that the Ohio Oil Company had paid out to J. W. Solley on account of his pretended interest in said oil wells the sum of \$6,108.26 and that the Ohio Oil Company, on the 10th day of August, 1910, had still in its hands the sum of \$3458.69, which its books showed was still due and owing to the said J. W. Solley, for oil produced from the property of James A. Smith.

5. The Master further finds that up to the 10th day of August, A. D. 1910, the said Ohio Oil Company had paid to C. F. Johnson on account of his pretended interest in said oil derived from real estate, of the said James A. Smith as claimed by him, the sum of \$4,504.80, and that the Ohio Oil Company still retained in its possession at that time to the credit of the said C. F. Johnson the sum of \$2769.87.

6. The Master further finds that the said Ohio Oil Company has paid to the defendant, Walter Hennig, on account of his working interest in the oil derived from the real estate of the said James A. Smith in question, the sum of \$3990.26 and that it still retains in its possession, and credited to him on its books the sum of \$314.53.

7. The Master further finds that the said Ohio Oil Company has paid to one M. Ellis, a person not a party to this suit, but who claims to have acquired an interest in the property in question, the sum of \$1973.74, and still has in its hands and credited on the books to him the sum of \$26.26.

8. The Master further finds that each of the said defendants, J. W. Solley, C. F. Johnson and Walter Hennig, should account to the complainants, Guffey, Gillespie and Pitcairn, for the several items of money respectively received by them, as above found, from the Ohio Oil Company, and that the Ohio Oil Company should account to the said Complainants, Guffey, Gillespie and Pitcairn for the several sums of money that it still retains in its possession, and credited as owing to the several defendants above named, and also account for the sums of money paid to the said M. Ellis.

9. The Master further finds that the oil and gas lease obtained by the complainants, Guffey, Gillespie & Pitcairn, provided for the payment of a one-eighth royalty to James A. Smith, the owner of the land, and that the lease under which the defendants operated provided for the payment of one-sixth of the oil produced, as royalty to the owner of the land, and that the Ohio Oil Company is liable account to the complainants for the difference of the value of the royalty paid; that is to say, the Ohio Oil Company is liable to account to the complainants for one twenty-fourth ($1/24$) of the value of the oil produced on which a royalty of one-sixth was set aside to the owners of the land, since it was notified of the claim of the

complainants. Said sum being still held by said Ohio Oil Company.

10. The Master further finds that the oil and gas lease obtained by the complainants, Guffey, Gillespie and Pitcairn provided for a one-eighth royalty to the owner of the land, and that the lease under which Solley, Johnson and Hennig operated, provided for the payment of one-sixth of the oil produced, as royalty to the owner of the land; and that under this lease, for a time the defendant, James A. Smith, received royalty on the basis of one-sixth of the oil produced, and that the said James A. Smith is liable to account to the complainants for the difference in the value of the royalty paid during the time he actually received it; that is to say, the said James A. Smith is liable to account to the complainant for one twenty-fourth (1/24) of the value of the oil produced on her land, on which a royalty of one-sixth was paid to her by the Ohio Oil Company, and the Master further finds that this difference of royalties is \$112.72, for which sum he should account to the complainants.

11th. The Master further finds that the defendants, Solley, Johnson and Hennig, have placed certain improvements upon the real estate in question, covered by the lease in controversy in this case, in the way of placing thereon certain oil and gas wells, certain well rigs, pipe lines, shackle rods, pumping apparatus, and other
530 machinery used in and about the production of crude oil, and that the value of such improvements upon the land of the said James A. Smith is found by the Master to be the sum of \$14,548.55.

12. The Master further finds, and so reports to the court that, inasmuch as the defendants entered upon the real estate in question without lawful authority, and with notice of the lease owned by the complainants, Guffey, Gillespie and Pitcairn, that the defendants are not entitled to set off the amount above found against the value of the oil produced and taken from said premises, but that the defendants, Solley, Johnson and Hennig, should be permitted to remove from said real estate all personal property and fixtures of a removable nature, but not any of the permanent improvement placed thereon by them.

13. The Master further finds that in case the defendants, J. W. Solley, C. F. Johnson and Walter Hennig, do not account to the complainants, Guffey, Gillespie and Pitcairn, for the value of the oil and petroleum products received by them from the Ohio Oil Company, that then and in that case, the said Ohio Oil Company should be required to account to the complainant for such money paid out by it to said defendants.

The master further finds as a matter of law, that the complainants are entitled to an accounting against the defendants, C. F. Johnson, J. W. Solley, Walter Hennig, James A. Smith, and the Ohio Oil Company, and that the defendants, J. W. Solley, C. F. Johnson and Walter Hennig, are not entitled to any credit on account of any permanent improvement placed by them upon the lands in controversy covered by the oil and gas lease in this case.

All of which is respectfully reported.

WALTER T. GUNN,
Master in Chancery.

Be it further remembered that on to-wit: January 27th, A. D. 1911, the complainants filed their exceptions to the Master's report in the words and figures following, to-wit:

31

Filed Jan. 27, 1911.

UNITED STATES OF AMERICA:

in the Circuit Court of the United States for the Eastern District of Illinois.

JOSEPH F. GUFFEY, A. S. GUFFEY, E. N. GILLESPIE, and ROBERT PITCAIRN, JR., Copartners Trading as Guffey, Gillespie & Pitcairn,

vs.

JAMES A. SMITH, H. E. WILCOX, J. W. SOLLEY, C. F. JOHNSON, Walter Hennig, The Ohio Oil Company, a Corporation; Perry A. Little, and Lewis E. Willett.

Exceptions to Master's Report.

Now comes the complainants, Joseph F. Guffey, A. S. Guffey, E. N. Gillespie and Robert Pitcairn, Jr., copartners, trading as Guffey, Gillespie & Pitcairn, by Callihan, Jones & Lowe, James H. Beal, Robert J. Dodds, Arthur E. Young and Charles Troup, their solicitors, and file exceptions to the findings of fact and conclusions of law heretofore filed herein in the office of the Clerk of this court by Walter T. Gunn, Master in Chancery of this court, in the following particulars, to-wit:

1st. The Master erred in not finding and reporting that the defendants, J. W. Solley, C. F. Johnson and Walter Hennig, should account and pay to the complainants the sums of money derived from gas produced from the premises covered by the lease in controversy herein, which gas was used and sold by said defendants, J. W. Solley, C. F. Johnson and Walter Hennig.

2d. The Master erred in not finding and reporting that the defendants, J. W. Solley, C. F. Johnson and Walter Hennig, should pay interest to the complainants at the legal rate in the state of Illinois on the various sums of money paid by The Ohio Oil Company for oil run from the premises covered by the leases in controversy, from the dates when said payments were made as shown by the statement of The Ohio Oil Company introduced in evidence herein.

JAS. H. BEAL,
CALLAHAN, JONES & LOWE,
ARTHUR E. YOUNG,
ROBERT J. DODDS,
CHARLES TROUP,

Solicitors for Complainants.

STATE OF ILLINOIS,
Vermilion County, ss:

Charles Troup, first being duly sworn on oath, deposes and says that he has examined the foregoing exceptions to the report of the Master and knows the contents thereof.

Affiant further says that said exceptions to said report are not interposed for delay, but for good cause and that justice may be done.

Dated this 27th day of January, A. D. 1911.

CHARLES TROUP.

Subscribed and sworn to before me, a notary public, this 27th day of January, A. D. 1911.

[N. P. SEAL.]

ELISABETH LEINS,
Notary Public.

Be it further remembered that afterwards on to-wit: February 6th, 1911, came the defendants, James A. Smith, J. W. Solley, C. F. Johnson and Walter Hennig, and filed in the office of the clerk of said court, their exceptions to the report of the Master-in-Chancery in the words and figures following, to-wit:

533

Filed Feb. 6, 1911.

THE UNITED STATES OF AMERICA:

In the Circuit Court of the United States for the Eastern District of Illinois.

No. 331. In Chancery.

JOSEPH F. GUFFEY, A. S. GUFFEY, E. N. GILLESPIE, and ROBERT Pitcairn, Copartners Trading as Guffey, Gillespie and Pitcairn, Complainants,

VS.

JAMES A. SMITH, H. E. WILCOX, J. W. SOLLEY, C. F. JOHNSON, Walter Hennig, The Ohio Oil Company, a Corporation; Perry A. Little, and Lewis E. Little, Defendants.

Exceptions Taken by the Defendants, James A. Smith, J. W. Solley, C. F. Johnson, and Walter Hennig, to the Report Made by Walter T. Gunn, Master in Chancery of This Court, to Whom the Above-entitled Cause Was Referred by Order of This Court Made and Entered of Record in said Cause.

Come now James A. Smith, J. W. Solley, C. F. Johnson, and Walter Hennig, defendants in the above entitled cause, and jointly and severally except to the report of the Master in Chancery in said cause, said report being composed of an original report filed by said Master on the 24th day of December, A. D. 1909, together with a subsequent and supplemental report filed in said cause by said Mas-

er, by which subsequent and supplemental report said original report, as changed and modified, is adopted and made a part thereof.

Said defendants except to said report so constituted and composed, and to the finding of facts and conclusions of law therein
 34 found and stated, and say that said Master committed error therein in each of the following particulars, to wit:

First. For that said Master in his said original report in finding numbered Six (6) thereof, found and stated conclusions and not facts, and the whole of said finding is based upon incompetent testimony admitted over the objection of these defendants, which testimony was in relation to certain customs of persons engaged in the business of producing oil.

Whereas, the rights of the parties to this action are fixed and determined by contract, and not by custom, and the Master should not have received and considered said incompetent testimony upon which said finding is based.

Second. For that said Master in his said original report in finding numbered Six (6) thereof, erroneously found, as a fact proved, that oil and gas leases containing a "surrender clause" are very generally, not universally used, especially in leasing what is commonly called "wild cat" territory, and that oil and gas are found stored and confined in certain kinds of sand at considerable distance beneath the surface of the earth; that the presence of oil and gas in paying quantities can only be ascertained to a certainty by drilling; that the drilling of such wells is a very expensive method of search and by the terms of such leases, born by the operator; that the usual custom of exploring for oil or gas in "wild cat" or undeveloped territory is for the operator, if possible, to obtain a very large block of territory to be explored for oil or gas; that he begins with a test well and can then go on drilling in different directions as signs of oil or gas improve; that if he has a small amount of territory and he could discover oil near the edge of his block of leases, other operators can lease adjacent lands and obtain substantial benefits from his explorations; that in exploring for oil or gas, in new territory, it is customary to drill only one well at a time as the information gained in drilling each well is of advantage in locating the next well, that in many parts of the country, it has been found impracticable to drill in winter or spring on account of the impassable condition of the country roads for heavy traffic; that other conditions have rendered it customary for oil operators to secure as large a block of land as possible and to provide in the lease for either the drilling of the well or the payment of the rental in case of failure to drill; that the object of the "surrender" clause is to allow the operator to cancel his block of leases or any part of it, at any time; that land may be tested and found unproductive of oil or gas and the land can then be surrendered to the owner; that the rental provided for keeps on accruing until the time of the drilling of the well or the cancellation of the lease and in a large block of land the expense of paying rentals amounts to a great deal; that the object of the lease is to explore for oil and gas, it does not appear that after the field has been tested, and found unproductive,

that the presence of said "surrender Clause" is an inequitable provision.

Whereas, said Master should have omitted said finding from his report, as the rights of the parties to this action are governed by contract and not by custom; that said finding is based upon and deduced from incompetent and improper evidence admitted over the objection of these defendants which should have been excluded and not considered by the Master in formulating his report.

Third. These defendants further except to said finding numbered Six (6) for the reason that said finding is based upon and deduced from the incompetent and improper testimony of John R. Penn, Andrew Bruner, J. H. Faubel, William Flynn, John H. Carter, A. B. Dally, John Worthington and other expert witnesses as to the use, purpose and effect of what is known as a "surrender clause" commonly found in oil and gas leases, and that it was upon such incompetent and improper testimony that the Master based his conclusion of law numbered One (1) "that the oil and gas lease entered into between M. A. Walton and James A. Smith on the 22nd day of May, 1905, is a valid enforceable contract entered into for a valuable consideration and binding upon the parties".

Fourth. These defendants except to finding of fact numbered Seven (7) of said original report wherein the Master states as a fact found, that the complainants have paid all of the rentals required by the lease to be paid, but fails to find when, how or to whom such payments were made; while, in fact, the evidence shows that said rentals were deposited in the Exchange Bank of Martinsville, Illinois, and that no such deposit was made until long after such rentals became due by the terms of the lease, and not until after the premises in controversy had been subsequently leased to another party for oil and gas purposes, and not until after a well was in process of construction under said subsequent lease; that none of the defendants had any knowledge of the depositing of said rentals until long after the premises had been developed and oil produced in paying quantities under the C. E. Allison lease which is now owned by the defendants, Solley, Johnson and Hennig; that defendant, Smith, has not accepted said rentals or any part thereof, and the Master committed error in not so finding as requested by these defendants.

As to the Conclusions of Law.

First. These defendants except to the conclusion of law numbered One (1) in the Master's original report, to wit: "That the oil and gas lease entered into between M. A. Walton and James A. Smith on the 22nd day of May, 1905, is a valid, enforceable contract, entered into for a valuable consideration, and binding between the parties."

Whereas, instead of said conclusion of law, the Master should have found and stated the following conclusion requested by these defendants: "That said oil and gas lease entered into between M. A. Walton and James A. Smith on the 22nd day of May, 1905, and which is now owned by the complainants herein and forms the basis of

their right of action in this cause, is not enforceable in a court of equity at the instance of the complainants".

These defendants except to the said conclusion as stated by the Master in his report, and also except to the refusal of the Master to state said conclusion as requested by these defendants.

Second. These defendants further except to said conclusion of law numbered One (1) in the Master's original report, to wit: "That the oil and gas lease entered into between M. A. Walton and James A. Smith on the 22nd day of May, 1905, is a valid and enforceable contract entered into for a valuable consideration and binding between the parties" for the reason that said lease was executed without a sufficient consideration; and that it lacks mutuality; that it is unfair and inequitable and not enforceable in a court of equity.

Third. These defendants except to the conclusions of law found and stated by the Master in his original report in this, that the Master refused to find and state as a conclusion of law that said oil and gas lease entered into between M. A. Walton and James A. Smith on the 22nd day of May, 1905, is not enforceable in a court of equity, as requested by these defendants.

Fourth. The defendants except separately to each the 2nd, 3rd, 4th, 5th and 6th conclusion of law stated by the Master in his original report, for the reason that they are each and all irrelevant, immaterial and not pertinent to a correct decision of this case.

Fifth. These defendants except to the conclusion of law numbered seven (7) in said original report to-wit: "That as against the defendants, Solley, Johnson and Hennig, the complainants are entitled to an injunction restraining the said Solley, Johnson and Hennig, or their agents, employes, representatives or any person acting for them, from in any manner interfering with the complainants entering upon said premises and developing the same for oil, and gas" for the reason that the lease through which the complainants claim title to the leasehold in controversy is not enforceable in a court of equity for want of consideration and for want of mutuality. That to enforce the same would be inequitable and unconscionable, and the Master erred in not so finding.

Sixth. These defendants except to the refusal of the Master to find and state the following conclusion requested by these defendants: "That the complainants are not entitled to an injunction or to any other relief prayed for and the bill should be dismissed for want of equity". The Master finding in his seventh conclusion of law, "That as against the defendants, Solley, Johnson and Hennig, the complainants are entitled to an injunction restraining the said Solley, Johnson and Hennig, or their agents, employes, representatives or any person acting for them, from in any manner interfering with the complainants entering upon said premises and developing the same for oil and gas".

Seventh. These defendants except to the refusal of the Master to find and state the following conclusion of law requested by the defendants: "That as against the defendant, James A. Smith, the complainants are not entitled to the relief prayed for, or any part

thereof, and the bill should be dismissed, as to him for want of equity."

Eighth. These defendants except to the conclusion of law numbered Eight (8) in said original report, to-wit: "That a
538 against the defendant, James A. Smith, he should be enjoined from assisting or aiding said Solley, Johnson and Hennig, from keeping possession of said premises under their said lease as against the rights of the said Guffey, Sillespie and Pitcairn", for the reason that the said Guffey, Gillespie and Pitcairn have no right or interest in said premises which are enforceable in a court of equity.

Ninth. The defendants Solley, Johnson and Hennig, except to the conclusion of law numbered Nine (9) in the Master's original report to-wit: "That the said complainants, as against the defendants, Solley, Johnson and Hennig, are entitled to an accounting in equity for the value of the oil and gas taken from said premises during the time they have been developing the same", for the following reasons:

(a) The lease owned by the complainants and upon which they base this cause of action, is not enforceable in a court of equity.

(b) If the lease owned by the complainants were equitable and enforceable, in this action, it would not entitled the complainants to such an accounting because it did not vest any title to the oil and gas in the complainants, but merely gave them a right to explore for oil and gas and to reduce the same to possession.

(c) The lease of the complainants, if enforceable, does not even purport to grant either the oil or gas to the complainants, but merely gives them a right of exploration; and if they have been damaged by the acts of the defendants, the measure of that damage is not the value of the oil and gas taken from the premises, but *if* any, it is such as they sustained by reason of their being deprived from doing that which the lease gave them a right to do, to-wit: to explore for oil and gas; and, as there was no evidence as to such damage, none could be recovered and the said conclusion is therefore erroneous.

(d) If the complainants have been damaged by the wrongful acts of the defendants, such damages are recoverable only in an action at law, and not in a suit in equity.

Tenth. These defendants, Solley, Johnson and Hennig, except to the refusal of the Master to find and state the following conclusion of law requested by said defendants: "As against the defendants, Solley, Johnson and Hennig, the complainants are not entitled to an accounting or any other relief prayed for and the bill should be dismissed for want of equity."

Eleventh. These defendants except to finding numbered
539 One (1) in the Master's supplemental report in so far as it adopts said original report filed by him in this case on the 24th day of December, 1909, for the reason that said original report so adopted and made a part of said supplemental report is erroneous in each and all of the particulars stated in the foregoing exceptions, and that said report should be corrected and changed, modified as therein indicated before being adopted as a part of said supplemental report.

Twelfth. These defendants except to the refusal of the Master to find and state the following finding of fact, in his supplemental report, which was requested by these defendants:

"That the oil produced from the premises in controversy was all produced by these defendants, Solley, Johnson and Hennig, from wells constructed by them and at their cost and expense; that the complainants never took possession of the premises in controversy, and never expended any money in developing said premises for the discovery of oil thereon, and never at any time produced either oil or gas therefrom, and never had possession of any oil or gas produced from said premises".

Whereas, the Master found in this supplemental report in finding numbered Two (2) thereof, "that from the wells placed upon the property in question oil was produced and conducted to tanks of the Ohio Oil Company by means of a certain pipe line, and that the Ohio Oil Company purchased said oil and paid the defendants, J. W. Solley, C. F. Johnson and Walter Hennig for certain portions of the oil", but failed and refused to find by whom said oil was produced which was so conducted to the tanks of the Ohio Oil Company for which payments *was* made to said defendants.

Thirteenth. These defendants except to finding of fact numbered Three (3) of the supplemental report of the Master, for that the Master finds that the Ohio Oil Company up to the 10th day of August, 1910, had received from the real estate of James A. Smith in controversy, exclusive of royalty to him, oil or oil products of the value of \$23,146.35 but failed and refused to find and state by whom and at whose expense said oil was produced, although requested to do so by these defendants.

Fourteenth. The defendants, Solley, Johnson and Hennig, except to finding numbered Eight (8) in said supplemental report, to wit: "That each of the said defendants, J. W. Solley, C. F. Johnson and Walter Hennig, should account to the complainants, Guffey, Gillespie and Pitcairn, for the several items of money respectively received by them, as above found, from the Ohio Oil Company, and that the Ohio Oil Company should account to the complainants, Guffey, Gillespie and Pitcairn, for the several sums of money that it still retains in its possession and credited as owing to the several defendants above named, and also account for the sums of money paid to said M. Ellis," for the following reasons:

(a) That the lease owned by the complainants is not enforceable in a court of equity because it is inequitable; that it was given without sufficient consideration; and for want of mutuality.

(b) That if the lease owned by the complainants were valid and enforceable, it gave to the complainants the right to explore for oil and gas, and to reduce the same to possession, and did not vest in the complainants title to or ownership of the oil and gas in place.

(c) That title to the oil and gas produced from the premises in controversy having never been in the complainants, they are not entitled to an accounting for the same, as against these defendant, but if the complainants have any remedy as against these defend-

ants, it is in an action at law to recover such damages as they may have sustained by reason of their having been deprived of the right given them by their lease, namely, the right to explore for oil and gas, if they were deprived of such right.

(d) If the complainants have sustained any damage by reason of any acts of the defendants, the measure of such damage is not the value of the oil and gas produced from the premises by the defendants, but such as might be proved in a court of law.

Fifteenth. The defendant, James A. Smith, excepts to finding numbered Ten (10) of the said supplemental report in this, that in said finding, the Master states that said defendant is liable to account to the complainants for one-twenty-fourth of the value of the oil produced on land in the sum of \$112.72 for the following reasons:

(a) That the lease held by the complainants is not enforceable in a court of equity for want of consideration and for want of mutuality;

541 (b) That the lease held by the complainants did not convey to the complainants the oil and gas in place, but gave to them only the right to explore for oil and gas and to reduce the same to possession. That since the complainants did not reduce any oil or gas to possession, they never became the owners thereof, and are not entitled to receive pay for the same.

(c) That if complainants have sustained any damage by reason of the operations upon the premises, in controversy and the production of oil therefrom, the remedy for such damage may be obtained only in an action at law and not in a suit in equity.

Sixteenth. The defendants, Solley, Johnson and Hennig, except to finding numbered Twelve (12) of the Master's supplemental report in this, to wit: "The Master finds that the defendants entered upon the real estate in question without lawful authority, and with notice of the lease owned by the complainants," which finding is not sustained by the evidence, but on the contrary the evidence shows that these defendants entered upon said premises in good faith and without any knowledge of the existence of *the existence of* the lease held by the complainants and that they had no knowledge of the existence of such lease until this action was brought in the Circuit Court of Crawford County Illinois.

Seventeenth. These defendants except to the refusal of the Master to find that the lease by them owned was purchased by them in good faith and without any knowledge of the existence of the lease owned by the complainants, and that these defendants had no knowledge of the existence of the complainants' lease until they were served with process from the Circuit Court of Crawford County, Illinois, when this action was brought in said court, as requested by these defendants.

Eighteenth. These defendants further except to said finding numbered Twelve in this particular: That the Master finds "That said defendants are not entitled to set off the amount above found against the value of the oil produced and taken from said premises."

Whereas, the Master should have found that these defendants

542 are entitled to set off the cost of the permanent improvements placed upon said premises by these defendants and the cost of producing the oil sold by them, against the amount received by them from the sale of said oil, as requested by these defendants.

Nineteenth. For that in finding numbered Thirteen (13) in the Master's supplemental report, the Master finds and states the following: "The Master further finds as a matter of law, that the complainants are entitled to an accounting against the defendants, C. F. Johnson, J. W. Solley, Walter Hennig, James A. Smith and the Ohio Oil Company and that the defendants, J. W. Solley, C. F. Johnson and Walter Hennig are not entitled to any credit on account of any permanent improvement placed by them upon the lands in controversy covered by the oil and gas lease in this case."

That these defendants except to said finding for these reasons:

(a) That the complainants are not entitled to an accounting as against these defendants in this action.

(b) That if the complainants are entitled to an accounting as stated by the Master in said finding, then these defendants would be entitled to a credit for the value of the permanent improvements by them placed upon the lands in controversy, and the Master should have so found as requested by these defendants.

Twentieth. These defendants except to the refusal of the Master to find and state as a conclusion of law the following conclusion requested by these defendants: "That these defendants are entitled to a credit for the value of the permanent improvements by them placed upon the lands in controversy.

Whereas, the Master found and stated in his Thirteenth conclusion of his supplemental report, that the defendants, J. W. Solley, C. F. Johnson and Walter Hennig are not entitled to any credit or account of any permanent improvement placed by them upon the lands in controversy covered by the oil and gas lease in this case.

Twenty-first. These defendants except to the refusal of the Master to find and state the present value of the lease-hold in controversy, although requested to do so by these defendants; that the

543 evidence shows said lease-hold to be of the value of Twenty Thousand Dollars, and the Master should have so found and stated in his report.

Twenty-second. These defendants except to the report of the Master filed herein in this, that on page 18 of his original report, the Master asserts an erroneous proposition as law as follows:

"If then, the presence of the surrender clause in the lease is a bar to the complainants' suit for injunction, it must be because the owner of the land, the complainants' lessor, is a party to the suit.

Whereas, the reason for the rule is the inherent infirmity of the instrument itself—a want of mutuality—which operates upon him who seeks to bind another while he, himself, is not bound. This infirmity renders such a contract impotent in the hands of him in whose favor the right to surrender is reserved without respect as to the party against whom he seeks to enforce it, and the Master should have so held.

Twenty-third. These defendants except to the report filed by the Master in this cause for the reason that said report was made under a misconception and misapplication of the law as announced and declared by the Supreme Court of the state of Illinois in the decisions of said court referred to by the Master on page 17 of his original report, to wit, Watfore Oil and Gas Company vs. Shipman et al., 236 Ill. 9, and Ulry vs. Keith, 237 Ill. 284.

That in the decisions rendered in said cause it is announced and declared to be the law that leases of the character of the lease owned by the complainants and which is in controversy in this case, are not enforceable in a court of equity at the instance of one in whose favor the power of revocation exists; that the decisions of said court in said cases constitute a rule of property in the state of Illinois which will be followed by this court, and the Master should have so found and held.

Whereas, the Master finds and states that the rule of law so announced and declared by the Supreme Court of said state in said causes, does not apply to this case.

Wherefore, These defendants respectfully ask that the report of the Master be revised, amended and corrected in the manner and in the particulars indicated by the foregoing exceptions, and
544 that when so revised, amended and corrected that the same be adopted and approved and judgment be rendered thereon in favor of these defendants.

Respectfully submitted,

J. W. SOLLEY,
C. F. JOHNSON, AND
WALTER HENNIG,

Defendants,

By PARKER & EAGLETON,
ABRAM SIMMONS, AND
JAY A. HINDMAN,

Solicitors for Defendants.

Be It Further Remembered that on to-wit, February 10, A. D. 1911, the defendant, the Ohio Oil Company filed in the office of the Clerk of said Court its exceptions to the report of the Master in Chancery in the words and figures following, to-wit:

545 Filed Feb. 10, 1911.

UNITED STATES OF AMERICA:

In the Circuit Court of the United States for the Eastern District of
Illinois.

No. 331. In Chancery.

JOSEPH F. GUFFEY, A. S. GUFFEY, E. N. GILLESPIE, ROBERT PIT-
CAIRN, JR., Copartners, Trading as Guffey, Gillespie & Pitcairn,

vs.

JAMES A. SMITH, H. E. WILCOX, J. W. SOLLEY, C. F. JOHNSON,
Walter Hennig, The Ohio Oil Company, a Corporation; Perry A.
Little, Lewis Willett.

*Exceptions to Master's Report by the Defendant The Ohio Oil
Company.*

Exceptions Taken by the Defendant The Ohio Oil Company to the
Original Report, and to the Supplemental Report, and to the
Finding of Facts and Conclusions of Law Therein Contained,
Made and Found by Walter T. Gunn, Master in Chancery of This
Court, to Whom This Case Was Referred by Order of This Court
Made and Entered of Record on the 5th Day of April, 1909,
and Re-referred to said Master in Chancery by This Court on
the 28th Day of July, 1910.

Said defendant, The Ohio Oil Company excepts to said original
Report, and to the Finding of Facts and conclusions of law as set
forth in said Original Report and says that the said Master com-
mitted error in each of the following particulars as hereinafter set
out, to-wit:

Finding of Facts as Stated in the Original Report.

I.

For that the said Master in his said Original Report, and in find-
ing of facts Four (4) thereof, found that a certain lease contains
the following provision:

546 "Upon the payment of one Dollar at any time by the part-
of the second part — heirs, successors or assigns, — said part-
of the second part — heirs, or assigns shall have the right
to surrender this lease for cancellation, after which all payments and
rentals thereafter to accrue under and by virtue of its terms and
shall cease and determine and this lease shall become absolutely
null and void,"

constituted what is commonly known in oil and gas leases as a "sur-
render clause."

Whereas the said Master should have found that said clause rendered said contract, unfair, unilateral and unenforceable in a court of equity, and that inasmuch as the second party is not bound to perform the covenants of said contract the first party is not bound and that a court of equity has no jurisdiction to grant relief to the complainants in this action.

II.

For that the said Master in his said Original Report, and finding of facts Six (6) thereof, found and stated conclusions and not facts, and the whole of finding Six (6) is based upon incompetent, immaterial and irrelevant testimony, in relation to a custom, convenience or necessity, for the benefit of the oil producer.

Whereas, said Master should not incorporate said finding Six (6) in his said report and finding of facts, and should not find and state said conclusions, and said finding Six (6) should be omitted.

III.

For that the said Master in his said Original Report and in finding Six (6) thereof, erroneously found that oil and gas leases containing a surrender clause are very generally if not universally used, especially in leasing what is commonly called "Wild Cat" territory, and that oil and gas are found stored and confined in certain kinds of sand at considerable distance beneath the surface of the earth; that the presence of oil and gas in paying quantities can only be ascertained to a certainty by drilling; that the drilling on such wells is a very expensive method of search, and is by the terms of such leases, borne by the operator; that the usual custom of exploring for oil and gas in "Wild Cat" or undeveloped territory is for the
547 operator, if possible to obtain a very large block of territory to be explored for oil and gas; that he begins with a test well and can then go on drilling in different directions as signs of oil and gas improve; that if he has a small amount of territory and he should discover oil near the edge of his block of leases, other operators can lease adjacent lands and obtain substantial benefit from his operations; that in exploring for oil or gas in new territory it is customary to drill only one well at a time, and the information gained by drilling each new well is of advantage in locating the next well; that in many parts of the country it has been found impractical to drill in winter or spring on account of the impassable condition of the country roads for heavy traffic; that other conditions have rendered it customary for oil operators to secure as large a block of land as possible and to provide in the lease for either the drilling of the well or the payment of rental in case of failure to drill; that the objects of the "surrender Clause" is to allow the operator to cancel his block of leases or any portion of it at any time that land may be tested and found unproductive of oil or gas and the land can then be surrendered to the owner; that the rental provided keeps on accruing until the time of the drilling of the well or of the cancellation of the lease, and the large block of leases; that the expense of paying rental amounts to a great deal; that since the object

of the lease is to explore for oil and gas, it does not appear that if the field has been tested and found unproductive that the presence of said surrender clause is an inequitable provision."

Whereas the said Master should have omitted said finding Six (6) from his said report and from his finding of facts, and should have found that the "surrender clause" was an inequitable provision and that the same rendered said contract unenforceable in a court of equity.

IV.

For that the said Master in his said Original Report, and in finding Six (6) thereof, found facts which were wholly irrelevant, improper and immaterial and such facts were facts as to a custom generally among oil operators and producers, and which could not in any way affect the rights of the parties to this cause, and especially this defendant, The Ohio Oil Company; that said facts so found were not within the issues in this cause, so far as the same affects the defendant, The Ohio Oil Company.

Whereas said finding Six (6) should be omitted.

V.

For that the said Master in his said original report and in finding Six (6) thereof, found facts, which can only be based upon and supported by improper, incompetent and irrelevant testimony.

Whereas, said finding Six (6) should be omitted from the report and from the facts found.

VI.

For that the said Master in his said Original Report and in finding Seven (7) thereof found that the complainants have paid all rentals required by the lease to be paid.

Whereas, said finding is the finding of a conclusion and not a fact, and the finding should state the amounts of each and all of such payments of rentals and when, where and to whom paid.

VII.

For that the said Master in his said Original Report and in finding Seven (7) thereof, found that the complainants have paid all rentals required by the lease to be paid.

Whereas, the said Master should have found, when, where and to whom such payments were made; that said rentals were deposited in the Exchange Bank of Martinsville, Illinois, but that said deposits were not made until long after such rentals became due and not until after the premises in controversy had been subsequently leased for oil and gas purposes; that said lessee was drilling a well on said premises at the time said rental was so deposited; that none of the defendants in this cause had any knowledge that said rental was deposited in said bank until long after the premises had been developed for, and oil and gas had been produced in paying quantities under the said lease owned by said Solly, Johnson and Hennig; that the said Solly, Johnson and Hennig and their assigns had made dili-

gent search to ascertain whether or not said rentals had been paid before operations were begun on said premises and that said lease was taken and operated in good faith.

VIII.

For that the said Master in his said Original Report and in the finding of facts therein contained, allowed and considered and gave full credit to the testimony of the witnesses John H. Penn, Andrew Bruner, J. H. Fauble, William Flynn, John H. Carter, A. E. Daly, John Worthington, John Galey and Gus Hurd and other so called expert witnesses, as to customs, usages, desires and conveniences of persons engaged in the business of producing oil, and especially as what is known as the "surrender clause" in leases generally, and the force and effect of the "surrender clause" in oil and gas leases, and its purpose and purposes in oil and gas leases and as to the advantages of the "surrender clause" and the disadvantages of the "surrender clause" in and out of oil and gas leases.

Whereas, the said Master should not have allowed the testimony of any of said witnesses and should have rejected all of said expert testimony, and should have refused to consider said expert testimony and should have held that said expert testimony was irrelevant, incompetent and immaterial, and should have not based any finding of facts or conclusions of law thereon.

Conclusions of Law as Stated in the Original Report.

1.

For that the said Master in his said Original Report and in conclusion of law number One (1) thereof, found; "That the oil and gas leases entered into between M. A. Walton, and James A. Smith and Susannah Smith, on the 22nd day of May, A. D. 1905 were valid enforceable contracts entered into for a valuable consideration and binding between the parties."

Whereas, the said Master should have stated said conclusions of law as follows: That the oil and gas leases entered into — M. A. Walton and James A. Smith and Susannah Smith on the 22nd day of May A. D. 1905, were unilateral and unenforceable in a court of equity and that said contracts can not be enforced in this cause of action.

2.

For that the said Master in his said Original Report, and in conclusion of law number Three (3) thereof, found,

"That the record of such leases in the office of the Recorder of Deeds, in the County of Crawford and State of Illinois, was notice to all persons purchasing or intending to purchase any interest in the oil and gas under said lands, of the existence of such prior, valid existing contract."

Whereas, said Master should have stated said conclusion of law as follows: That the record of such leases in the office of the Recorder of Deeds in the County of Crawford, and State of Illinois, was notice to all persons of the execution of said oil and gas leases, and of the rights of the complainants thereunder, as therein provided.

3.

That the said Master in his said Original Report, and in conclusion of law number Four (4) thereof found: "The Master further finds that the said C. E. Allison at the time he obtained from the said James A. Smith and Susannah Smith oil and gas leases which were afterwards assigned to Solley, Johnson and Hennig, had notice either actual or constructive of the existence of the prior oil and gas lease, executed to the said M. A. Walton, and now owned by the complainants in this case, and his assignees had like notice either actual or constructive."

Whereas said conclusion of law numbered Four (4) should be omitted as it is not a conclusion of law, but the statement of a fact.

4.

For that the said Master in his said Original Report stated the law to be:

"The ruling in *Ulrey vs. Keith* 237 Ill. 284, which holds that a suit to enjoin a breach of contract is governed by the same rules as will for specific performance, and remedy by injunctions will be denied if the contract is so wanting in mutuality that the defendant being free from personal bar, could not specifically enforce the contract against the complainant," has no application to this cause.

Whereas, the said Master should have declared the law to be, that the ruling in the case of *Ulrey vs. Keith* 137 Ill., 284, is applicable to this cause, and is a rule of property in the State of Illinois.

5.

For that the said Master in his said Original Report stated the law to be:

"That the rule of law declared in the cases of *Watford Oil & Gas Co. vs. Shipman* 236 Ill. 9; *Ulrey vs. Keith* 237 Ill. 284 would not apply to this cause.

Whereas the Master should hold that the rule as declared by the Supreme Court of the State of Illinois applies to and is the rule of law in this cause.

Said defendant, The Ohio Oil Company excepts to said Supplemental Report and to the Finding of Facts and conclusions of law set forth in said Supplemental Report, and says that the said Master committed error in each of the following particulars as hereafter set out, to-wit:

Findings of Facts as Stated in the Supplemental Report.

I.

For that the said Master in his said Supplemental Report and in finding numbered One (1) thereof: Adopted the said report of said Master filed with the Clerk of this court on the 24th day of December, A. D. 1909.

Whereas said Original Report is erroneous in each and all of the particulars shown in the above and foregoing exceptions and should not be made a part of said Supplemental Report.

II.

For that the said Master in his said Supplemental Report and in finding numbered Two (2) thereof, found as follows: "The Master further finds that from the wells placed upon the properties in question oil was produced and conducted to the tanks of the Ohio Oil Company by means of certain pipe line and that The Ohio Oil Company purchased said oil and paid the defendants J. W. Solley, C. F. Johnson and Walter Hennig for certain portions of oil in the amounts hereinafter found, and paid certain other portions of the value of said oil to one M. Ellis and also paid the royalty due to the owners of said real estate."

552 Whereas, said Master should further find that said oil was produced by the defendants Solley, Johnson and Hennig from wells constructed by them and at the cost and expense of the said Solley, Johnson and Hennig; that the complainants never took possession of the premises in controversy and never expended any money in developing the said premises for the purpose of discovering oil or gas thereon, and never at any time produced either oil or gas from said premises and never had possession of any oil or gas produced from said premises.

III.

For that the said Master in his said Supplemental Report and in finding number Three (3) thereof found as follows:

"The Master further finds that the Ohio Oil Company up to the 10th day of August, A. D. 1910 had received from the real estate of the said James A. Smith exclusive of the royalty due to the said James A. Smith, oil or oil products of the value of \$23,146.35.

Whereas the said Master should have found as follows:

The Master further finds that the Ohio Oil Company up to the 10th day of August, A. D. 1910 had received from the real estate in controversy belonging to James A. Smith, exclusive of the royalty due to the said James A. Smith oil or oil products for which said defendant The Ohio Oil Company paid the sum of \$23,146.25 and that said oil was produced by the defendants, Solley, Johnson and Hennig from wells on the real estate in controversy belonging to the said James A. Smith which wells were drilled and said oil was produced wholly at the expense of said Solley, Johnson and Hennig

and that said oil was taken possession of by said Solley, Johnson and Hennig and delivered to said defendant The Ohio Oil Company and that the complainants never had possession of said oil.

IV.

For that the said Master in his said Supplemental Report and as a part of Finding numbered One (1) thereof found as follows:

"With the exception of the finding with reference to the Ohio Oil Company in paragraph No. 15 on page 12 of the Original Report wherein it was recommended that the bill of complaint as to The Ohio Oil Company be dismissed and in this Supplemental Report on account of the additional evidence introduced herein, 553 the Master recommends that the Ohio Oil Company be retained as defendant and held liable to an accounting for the value of oil or gas received by it as specified in this report."

Whereas said portion of finding numbered One (1) of said Supplemental report should be omitted from the Master's Supplemental Report.

V.

For that the said Master in his Supplemental Report and in finding numbered Eight (8) thereof, found as follows:

"The Master further finds that each of the defendants, J. W. Solley, C. F. Johnson and Walter Hennig should account to the complainants Guffey, Gillespie and Pitcairn for the several items of money respectively received by them as above found, from the Ohio Oil Company and that The Ohio Oil Company should account to the said Complainants Guffey, Gillespie and Pitcairn for the several sums of money that it still retained in its possession and credited as owing to the several defendants above named and also account for the sum of money paid to the said M. Ellis."

Whereas the said finding numbered Eight (8) should be omitted and eliminated from said report and from said finding of facts.

VI.

For that the said Master in his said Supplemental Report and as a part of finding Numbered Eight (8) thereof, found as follows:

"And that The Ohio Oil Company should account to said complainants Guffey, Gillespie and Pitcairn for the several sums of money that it still retains in its possession and credited as owing to the several defendants above named and also account for the sums of money paid to the said M. Ellis."

Whereas said portion of said finding numbered Eight (8) should be omitted from said Supplemental Report and from the finding of facts therein contained.

VII.

For that the said Master in his said Supplemental Report and in finding numbered Nine (9) thereof found as follows:

"The Master further finds that the oil and gas lease obtained by the complainants Guffey, Gillespie and Pitcairn provided
554 for the payment of $\frac{1}{8}$ royalty to the said James A. Smith and that the lease under which the defendants operated provided for the payment of $\frac{1}{6}$ of the oil produced as royalty to the owner of the land and that The Ohio Oil Company is liable to account to the complainants for the difference of the value of the royalty paid: that is to say The Ohio Oil Company is liable to account to the complainants for $\frac{1}{24}$ of the value of the oil produced on which a royalty of $\frac{1}{6}$ was allowed to the owner of the land, since it was notified of the claim of complainants, said sum still being held by the said The Ohio Oil Company."

Whereas said finding of fact numbered Nine (9) should be eliminated.

VIII.

For that the said Master in his said Supplemental Report and in finding numbered Thirteen (13) thereof found as follows:

"The Master further finds that in case the defendants J. W. Solley, C. F. Johnson and Walter Hennig do not account to the complainants Guffey, Gillespie and Pitcairn for the value of the oil and petroleum products received by The Ohio Oil Company, that then and in that case the said The Ohio Oil Company should be required to account to the complainant for such money paid out by it to the defendants."

Whereas the said Master should find that the said The Ohio Oil Company should not be required to account to the complainant for such money paid out by it to the defendants.

IX.

For that the said Master in his said Supplemental Report and finding of facts should find the additional fact: That the defendants Solley, Johnson and Hennig entered upon said premises and drilled said wells thereon in good faith believing that they had the legal right to do so and that they delivered said oil into the pipe lines of The Ohio Oil Company fully believing that they were the owners of the same and had the legal right to do so and that The Ohio Oil Company purchased said oil believing it had the right to purchase the same and that the sellers thereof were the legal owners of said oil.

Whereas the said Master erred in failing to find said additional facts.

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X.

For that the said Master in his said report should have found the following additional facts; That it is and was the consideration for the execution of said oil and gas lease that the complainants should have drilled and developed the real estate described in said lease for oil and gas for the interest of the landowner, and that the said rentals mentioned in said oil and gas lease was a mere penalty and was not the real consideration for which said lease was executed and that the

real consideration for the execution of said lease on the part of said landowner was the development of the real estate for oil and gas.

Whereas the said Master erred in failing and refusing to find said additional facts.

XI.

For that the said Master in his said report should have found the following additional facts: That the said complainants were holding said lease for speculative purposes and awaiting developments for oil and gas with the intention of not drilling for oil and gas on said real estate unless developments for oil and gas on other lands by other persons demonstrated that it would be profitable to drill on the lands in controversy.

Whereas said Master erred in failing to find said additional facts.

Conclusions of Law as Stated in the Supplemental Report.

1.

For that the said Master in his said Supplemental report and in a conclusion of law thereof, found: "The Master further finds as a matter of law that the complainants are entitled to an accounting against the defendants C. F. Johnson, J. W. Solley and Walter Hennig, James A. Smith and The Ohio Oil Company and that the defendants J. W. Solley, C. F. Johnson and Walter Hennig are not entitled to any credit on account of any permanent improvement placed by them upon the lands in controversy covered by the oil and gas lease in said cause."

556 Whereas the said Master should have stated that said conclusion of law as follows: That the complainants are not entitled to an accounting against The Ohio Oil Company, in said action, and said bill of complaint, as to it, should be dismissed.

2.

For that the said Master in his Supplemental Report finds his conclusion of law is as follows: "The Master further finds that each of the said defendants J. W. Solley, C. F. Johnson and Walter Hennig should account to the complainants Guffey, Gillespie and Pitcairn for the several items of money respectively received by them as above found, from The Ohio Oil Company, and that The Ohio Oil Company should account to the said complainants Guffey, Gillespie and Pitcairn for the several sums of money that it still retains in its possession and credited as owing to the several defendants above named and also account for the sums of money paid to the said M. Ellis."

Whereas, said conclusion of law as to The Ohio Oil Company should be as follows: The Ohio Oil Company should not account to the said complainants Guffey, Gillespie and Pitcairn for the several sums of money that it still retains in its possession and credited as owing to the several defendants above named and should not account for the sums of money paid to the said M. Ellis.

3.

For that the said Master in his said Supplemental Report and a conclusion of law therein found as follows: "The Master further finds that the oil and gas lease obtained by the complainants Guffey, Gillespie and Pitcairn provided for the payment of $1/8$ royalty to the said James A. Smith and that the lease under which the defendants operated provided for the payment of $1/6$ of the oil produced as royalty to the owners of the land and that The Ohio Oil Company is liable to account to the complainants for the difference of the value of the royalty paid."

Whereas, said conclusion of law should be as to The Ohio Oil Company as follows: The Ohio Oil Company is not liable to account to the complainants for the difference of the value of the royalty paid.

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4.

For that the said Master in his said Supplemental Report and in his conclusions of law therein stated, found as follows:

"That is to say The Ohio Oil Company is liable to account to the complainants for $1/24$ of the value of the oil produced on which a royalty of $1/6$ was allowed to the owner of the land since it was notified of the claim of complainants said sum still being held by said The Ohio Oil Company."

Whereas, said conclusion of law should have been as to The Ohio Oil Company that it is not liable to account for said sum still being held by said The Ohio Oil Company.

5.

For that the said Master in his said Supplemental Report and a conclusion of law therein stated, found as follows:

"The Master further finds that in case the defendants S. W. Solley, C. F. Johnson and Walter Hennig do not account to the complainants Guffey, Gillespie and Pitcairn for the value of the oil and petroleum products received by the Ohio Oil Company, then and in that case the said Ohio Oil Company should be required to account to the complainants for such money paid out by it to the defendants."

Whereas said conclusion of law should have been stated as to The Ohio Oil Company as follows: The said The Ohio Oil Company should not be required to account to the complainants for such money paid out by it to the defendants.

Said Master Should Have Found and Stated the Further and Additional Conclusions of Law.

1.

For that the said Master in his said report and in his conclusion of law should have found as a conclusion of law as follows: That the said complainants acquired no interest in said premises belonging

ing to said James A. Smith by virtue of said oil and gas lease except the right to operate for oil and gas thereon and to reduce the same to possession and that said complainants had no vested interest in or title to the oil in place and had no vested interest in or title to the oil which was produced by the defendants Solley, Johnson and Hennig and sold to and received by the defendant The Ohio Oil Company.

Whereas, said Master erred in not stating said conclusion of law.

2.

For that said Master in his said report and in his conclusions of law therein should have found as follows: That the complainants are not the owners of the oil produced from said premises and have no right to an accounting therefor and have no right to recover a judgment against the defendant The Ohio Oil Company for the value thereof.

Whereas the said Master erred in not stating said conclusion of law.

3.

For that the said Master in his said report and in his conclusions of law therein should find as follows: That the complainants are not entitled to an accounting against the defendant The Ohio Oil Company for any sum whatever.

Whereas the Master erred in not stating said conclusions of law.

4.

For that the said Master in his said report and in his conclusions of law should find as follows: That the oil and gas lease and contract under which the said complainants claim an interest in the lands of the said James A. Smith and the oil and gas thereunder and the right to take the oil and gas therefrom is unfair, unilateral, unequitable and lacks mutuality and that the same cannot be enforced in a court of equity and that specific performance cannot be had thereof.

Whereas the said Master erred in not stating said conclusion of law.

5.

For that the said Master should have found as a conclusion of law as follows: That damages for the oil sold to and purchased by the defendant The Ohio Company from J. W. Solley, C. F. Johnson, Walter Hennig, M. Ellis and James A. Smith cannot be recovered from the said The Ohio Oil Company in a court of equity and that this court has no jurisdiction to grant such relief.

Whereas the said Master erred in not stating said conclusion of law.

6.

For that the said Master should have found as a conclusion of law as follows: That the amount for which said oil was sold to the

defendant, The Ohio Oil Company, by its co-defendants, is not the proper measure of damages in this cause, and the complainants are not entitled to recover a judgment for damages against the said defendant, The Ohio Oil Company, for the amount of money for which said oil was sold.

Whereas, the said Master erred in not stating said conclusion of law.

7.

For that the said Master should have found as a conclusion of law as follows: That the facts proven and found in this cause do not show that any of the defendants were guilty of wilful trespass in the taking of said oil, and do not show any intent on the part of the said defendants to do the complainants, or their said oil lease, or leasehold estate, any malicious or wilful injury in the taking of said oil from said real estate, and that said complainants are not entitled to recover a judgment against the defendant, The Ohio Oil Company, for the amount for which said oil was sold.

Whereas, the said Master erred in not stating said conclusion of law.

Wherefore, the defendant, The Ohio Oil Company objects and excepts to the said original report of said Master, and to said Supplemental Report of said Master, and to the findings of facts and to each finding of fact so found in each of said reports, and to the conclusions of law stated, and to each conclusion of law stated by the said Master, and to the failure of said Master to state additional and further conclusions of law, as shown in the above and foregoing objections and exceptions, and for each and all of the reasons, and in each and all of the particulars as therein stated, and said defendant submits that said reports, finding of facts and conclusions of law should be varied, changed, altered and omitted in accordance with said objections and exceptions.

560 The defendant The Ohio Oil Company hereby prays that each and all of its said objections and exceptions be sustained and granted.

THE OHIO OIL COMPANY, *Defendant.*

F. E. HURLEY AND
ABRAM SIMMONS,

Solicitors for Defendant The Ohio Oil Company.

Filed Mar. 24, 1911.

Be it further remembered that on to-wit: March 24th, 1911, came the defendant, The Ohio Oil Company and filed in the office of the clerk of said court its petition for leave to withdraw and dismiss certain exceptions to the report of the Master-in-Chancery.

UNITED STATES OF AMERICA:

In the Circuit Court of the United States for the Eastern District of Illinois.

No. 331. In Chancery.

JOSEPH F. GUFFEY, A. S. GUFFEY, E. N. GILLESPIE, ROBERT Pitcairn, Jr., Co-partners, Trading as Guffey, Gillespie & Pitcairn,

vs.

JAMES A. SMITH, H. E. WILCOX, J. W. SOLLEY, C. F. JOHNSON, Walter Hennig, The Ohio Oil Company, a Corporation; Perry A. Little, Lewis Willett.

Petition by Defendant The Ohio Oil Company to Withdraw and Dismiss Certain Exceptions to the Master's Report.

To the Honorable Judges of the Circuit Court of the United States for the Eastern District of Illinois:

The defendant, The Ohio Oil Company most humbly begs leave to withdraw and dismiss the following written exceptions filed by said defendant, The Ohio Oil Company, to the original report, and to the Supplemental report, and to the finding of facts and conclusions of law, therein contained, made and found, by Walter T. Gunn, Master in Chancery, of this court, to whom this cause was referred by order of this Court made and entered of record on the 5th day of April 1909, and re-referred to said Master in Chancery by this court on the 28th day of July, 1910.

The said exceptions which the said defendant, The Ohio Oil Company, so begs leave to withdraw and dismiss are under the following headings and are numbered and in words and figures as follows.

Under the Heading

"Finding of Facts as Stated in the Original Report."

1.

For that the said Master in his said Original Report, and in finding of facts Four (4) thereof, found that a certain lease contains the following provision:

Upon the payment of one Dollar at any time by the part- of the second part — heirs, successors or assigns. — said part- of the second part — heirs, or assigns shall have the right to surrender this lease for cancellation, after which all payments thereafter to accrue under and by virtue of its terms shall cease and determine and this lease shall become absolutely null and void."

constituted what is commonly known in oil and gas leases as a "surrender clause."

Whereas the said Master should have found that said clause rendered said contract, unfair, unilateral and unenforceable in a court of equity, and that inasmuch as the second party is not bound to perform the covenants of said contract the first party is not bound and that a court of equity has no jurisdiction to grant relief to the complainants in this action.

III.

For that the said Master in his said Original Report and in finding six (6) thereof, erroneously found "that oil and gas leases containing a surrender clause are very generally if not universally used, especially in leasing what is commonly called "Wild Cat" territory, and that oil and gas are found stored and confined in certain kinds of sand at considerable distance beneath the surface of the earth; that the presence of oil and gas in paying quantities can only be ascertained to a certainty by drilling; that the drilling of

562 such wells is a very expensive method of search, and is by the terms of such leases, borne by the operator; that the usual custom of exploring for oil and gas in "Wild Cat" or undeveloped territory, is for the operator, if possible to obtain a very large block of territory to be explored for oil and gas; that he begins with a test well and can then go on drilling in different directions as signs of oil and gas improve; that if he has a small amount of territory and he should discover oil near the edge of his block of leases, other operators can lease adjacent lands and obtain substantial benefit from his operations; that in exploring for oil or gas in new territory it is customary to drill only one well at a time, and the information gained by drilling each new well is of advantage in locating the next well; that in many parts of the country it has been found impractical to drill in winter or spring on account of the impassable condition of the country roads for heavy traffic; that other conditions have rendered it customary for oil operators to secure as large a block of land as possible and to provide in the lease for either the drilling of the well or the payment of rental in case of failure to drill; that the object of the "surrender clause" is to allow the operator to cancel his block of leases or any portion of it any time that land may be tested and found unproductive of oil or gas and the land can then be surrendered to the owner; that the rental provided keeps on accruing until the time of the drilling of the well or of the cancellation of the lease, and the large block of leases; that the expense of paying rental amounts to a great deal; that since the object of the lease is to explore for oil and gas, it does not appear that if the field has been tested and found unproductive that the presence of said surrender clause is an inequitable provision."

Whereas the said Master should have omitted said finding Six (6) from his said report and from his findings of facts, and should have found that the "surrender clause" was an inequitable provision and that the same rendered said contract unenforceable in a court of equity.

VIII.

For that the said Master in his said Original Report and in the finding of facts therein contained, allowed and considered and gave full credit to the testimony of the witnesses John H. Penn, Andrew Bruner, J. H. Fauble, William Flynn, John H. Carter, A. B. Daly, John Worthington, John Galey, and Gus Hurd and other so-called expert witnesses, as to customs, usages, desires and conveniences of persons engaged in the business of producing oil and especially as what is known as the "surrender clause" in leases generally, and the force and effect of the "surrender clause" in oil and gas leases, and its purpose and purposes in oil and gas leases and as to the advantages of the "surrender clause" and the disadvantages of the "surrender clause" in and out of oil and gas leases.

Whereas, the said Master should not have allowed the testimony of any of said witnesses and should have rejected all of said expert testimony, and should have refused to consider said expert testimony and should have held that said expert testimony was irrelevant, incompetent and immaterial, and should not have based any finding of facts or conclusions of law thereon.

Under the heading

"Conclusions of Law as Stated in the Original Report."

1.

For that the said Master in his said Original Report and in conclusion of law number One (1) thereof, found: "That the oil and gas leases entered into between M. A. Walton, and James A. Smith and Susannah Smith, on the 22nd day of May, A. D. 1905 were valid enforceable contracts entered into for a valuable consideration and binding between the parties."

Whereas, the said Master should have stated said conclusions of law as follows: That the oil and gas leases entered into between M. A. Walton and James A. Smith and Susannah Smith on the 22nd day of May A. D. 1905, were unilateral and unenforceable in court of equity and that said contracts can not be enforced in this cause of action.

4.

For that the said Master in his said Original Report stated the law to be:

"The ruling in *Ulrey vs. Keith* 237 Ill. 284, which holds that a suit to enjoin a breach of contract is governed by the same rules as bill for specific performance, and remedy by injunction will be denied if the contract is so wanting in mutuality that the defendant being free from personal bar, could not specifically enforce the contract against the complainant," has no application to this cause.

Whereas, the said Master should have declared the law to be, that the ruling in the case of *Ulrey vs. Keith* 137 Ill. 284, is applicable to this cause, and is a rule of property in the State of Illinois.

Under the heading

"Said Master Should Have Found and Stated the Further and Additional Conclusions of Law."

4.

For that the said Master in his said report and in his conclusions of law should find as follows: That the oil and gas lease and contract under which the said complainants claim an interest in the lands of the said Susannah Smith and the oil and gas thereunder and the right to take the oil and gas therefrom is unfair, unilateral, unequitable and lacks mutuality and that the same cannot be enforced in a court of equity and that specific performance cannot be had thereof.

Whereas, the said Master erred in not stating said conclusion of law."

Said defendant, The Ohio Oil Company most humbly asks leave to withdraw and dismiss the exceptions above set out, only, and requests the court to allow all other exceptions filed by said defendant to remain in the record as filed, and to consider all of said exceptions so filed, except the exceptions above set out, as requested in said exceptions.

THE OHIO OIL COMPANY, *Defendant.*

F. E. HURLEY,
ABRAM SIMMONS,

Solicitors for Defendant The Ohio Oil Company.

Be it further remembered that on to-wit: May 29th, A. D. 1911, the following proceedings were had and entered of record, to-wit:

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Order of May 29, 1911.

Chancery.

JOSEPH F. GUFFEY et al.

vs.

JAMES A. SMITH et al.

Now on this 29th day of May, A. D. 1911, this cause coming on to be heard upon the report of the Master-in-Chancery herein and upon the exceptions of the complainants and defendants thereto, come the parties, to this cause, complainants and defendants respectively, by their respective solicitors, and file and present to the court written briefs and arguments and agree that the said exceptions to the report of the Master-in-Chancery be submitted to the court on

the written briefs and arguments of counsel filed and without oral argument. Thereupon, the Court takes the said report of the Master-in-Chancery, together with the exceptions of the Complainants and defendants thereto, under advisement on the written briefs and arguments.

Be it further remembered that on to-wit: June 13th, A. D. 1911, the following final decree was made and entered of record in said cause, in the words and figures following, to-wit:

Final Decree. Filed June 13, 1911.

UNITED STATES OF AMERICA:

In the Circuit Court of the United States for the Eastern District of Illinois.

In Equity.

JOSEPH F. GUFFEY, A. S. GUFFEY, E. N. GILLESPIE, and ROBERT Pitcairn, Jr., Copartners, Trading as Guffey, Gillespie & Pitcairn,

vs.

JAMES A. SMITH, H. E. WILCOX, J. W. SOLLEY, C. F. JOHNSON, Walter Hennig, The Ohio Oil Company, a Corporation; Perry A. Little, and Lewis E. Willett.

And now, viz: 13th day of June, A. D. 1911, this cause came on to be heard upon the pleadings and the evidence and the
566 Master's reports and the exceptions thereto, and was, by agreement of counsel, submitted on printed arguments, and, thereupon, upon consideration thereof,

It Is Ordered, Adjudged And Decreed by the Court that the exceptions to the Master's reports be overruled and that the Master's reports be, and the same hereby are approved, confirmed and adopted as the findings of the court; and thereupon

It Is Further Ordered, Adjudged And Decreed by the court:

(1) That the oil and gas lease given by James A. Smith, to M. A. Walton, dated May 22d, 1905, and leasing for oil and gas purposes the west half of the northeast quarter of the northeast quarter of section 11, township 8 north, range 14 west, containing twenty acres, situate in Crawford county, state of Illinois, is, and has been, since its execution and delivery, a valid, subsisting, enforceable and assignable contract, and, by sundry mesne deeds of assignment, became vested on December 26th, 1905, in E. N. Gillespie for the use of himself and his copartners, the complainants in this case, and, in and by virtue of said lease complainants, since its assignment to them, have owned and held, and do now own and hold, the exclusive right and privilege to explore and operate said premises in the lease described for oil and gas purposes, and are entitled to enter and

take immediate possession of said premises for the purpose of operating and exploring the same for oil and gas purposes.

(2) That the oil and gas lease given by James A. Smith, to C. E. Allison, dated August 9th, 1906, and assigned September 1st, 1906, to Lewis E. Willett and thereafter assigned by Lewis E. Willett to J. W. Solley, and C. F. Johnson for the use of themselves and Walter Hennig, and leasing the same premises for oil and gas purposes, is null and void, and of no legal effect as against the rights of the complainants under their said lease, and in no way excuses or justifies the entry, possession and operation of said premises by the defendants, J. W. Solley, C. F. Johnson and Walter Hennig, or their predecessors in title, for oil and gas purposes.

(3) That no rights or claims have been asserted by any of the defendants under the two oil and gas leases given by James A. Smith to the defendant, H. E. Wilcox, both dated March 23d, 1906, and almost identical in terms, and that said two leases are null and void and of no legal effect as against the rights of the complainants under their said lease.

(4) As to the defendants, Lewis E. Willett and Perry A. Little, upon the pleadings and the evidence, the bill is dismissed at the cost of complainants.

(5) That the defendants, J. W. Solley, C. F. Johnson and Walter Hennig, their agents, servants, employes, representatives or any person acting for them, be enjoined, inhibited and restrained, and they are hereby enjoined, inhibited and restrained from in any manner interfering with complainants or their agents or representatives, in entering upon said described premises and possession, developing and operating the same for oil and gas purposes.

(6) That the defendant, James A. Smith, be enjoined, inhibited and restrained, and he hereby is enjoined, inhibited and restrained from aiding, assisting or abetting the defendants, J. W. Solley, C. F. Johnson and Walter Hennig, or any of them in taking or keeping possession of said premises against the rights or claims of complainants, or from preventing complainants from entering upon and operating said premises for oil and gas purposes.

(7) That the defendant, J. W. Solley, pay over to complainants, within forty (40) days from the entry of this decree the proceeds of the oil received by him prior to and including August 10th, 1910, from the Ohio Oil Company, as shown by the account stated to that date, viz: the sum of six thousand one hundred eight and twenty-six hundredths dollars (\$6,108.26), with interest thereon at five per cent (5%) from August 10th, 1910.

(8) That the defendant, C. F. Johnson, pay over to complainants within forty (40) days from the entry of this decree, the proceeds of the oil received by him prior to and including August 10th, 1910, from the Ohio Oil Company, as shown by the account stated to that date, viz: the sum of Four thousand five hundred four and eighty hundredths dollars, (\$4,504.80), with interest thereon at five per cent (5%) from August 10th, 1910.

(9) That the defendant, Walter Hennig, pay over to complainants, within forty (40) days from the entry of this decree the pro-

ceeds of the oil received by him prior to and including August 10th, 1910, from The Ohio Oil Company as shown by the account stated to that date, viz: the sum of three thousand nine hundred ninety and twenty hundredths dollars (\$3,990.20) with interest thereon at five per cent (5%) from August 10th, 1910.

(10) That the defendant James A. Smith, pay over to complainants the sum of One Hundred twelve and seventy-two hundredths dollars, (\$112.72), this sum being the difference between the proceeds of one-sixth and one-eighth royalty of oil actually received by the said James A. Smith, with interest thereon at five per cent (5%) from August 10th, 1910.

(11) That the defendant, The Ohio Oil Company pay over to complainants the value of the oil, received by it prior to and including August 10th, 1910, viz: the sum of twenty three thousand eight hundred seven and twenty-four hundredths dollars (\$23,807.24), with interest thereon at five per cent from August 10th, 1910, provided, however, that if the defendants, J. W. Solley, C. F. Johnson and Walter Hennig, or any of them shall pay to complainants the amounts herein decreed to be paid by them respectively, or any part thereof, the amounts so paid shall be deducted or credited upon any execution issued against The Ohio Oil Company for the enforcement of payment; that no execution shall be issued against The Ohio Oil Company until after the expiration of forty (40) acres from the entry of this decree; that the defendant, The Ohio Oil Company is and shall be entitled to execution in its behalf against its codefendants, J. W. Solley, C. F. Johnson and Walter Hennig, or any of them, for the respective portions of said sum of twenty-three thousand eight hundred seven and twenty-four hundredths dollars (\$23,807.24) mentioned in this decree, with interest at the rate of five per cent (5%) from August 10th, 1910, to be paid by each of said defendants, J. W. Solley, C. F. Johnson, and Walter Hennig, to the complainants; and the defendant, The Ohio Oil Company is hereby subrogated to all the rights of the complainants for any and all sums of money which it shall pay to the complainants, or any of the judgments herein mentioned, in favor of the complainants, against J. W. Solley, C. F. Johnson and Walter Hennig, or any of them.

(12) That a further accounting be had between complainants and J. W. Solley, C. F. Johnson, Walter Hennig and The Ohio Oil Company for the oil and its proceeds, produced from said premises, commencing at midnight of August 10th, 1910, during such time as defendants remain in possession of said premises and complainants kept out of possession thereof, such account to be governed by the same principles and rules which have been applied in ascertaining the amounts due and payable by said defendants respectively to complainants in the accounting already stated, and which this decree is, in part, based.

(13) That the defendants, J. W. Solley, C. F. Johnson and Walter Hennig, are not entitled to any set-off or allowance for expenditures made and value of improvements placed upon said premises, but they and their agents, servants and

representatives shall have thirty (30) days from the date of entry of this decree, within which to enter and re-enter upon the said premises, during which period they shall be permitted to remove all personal property and fixtures of a removable nature, owned or placed upon the premises by them, but not any permanent improvements or other improvements, personal property or fixtures, which cannot be removed without permanent injury done or threatened to the oil or gas wells upon the premises or to the leasehold estate for oil and gas purposes vested in complainants.

(14) That at the expiration of said period of thirty (30) days, commencing with the entry of this decree, the defendants, J. W. Solley, C. F. Johnson and Walter Hennig, their agents, servants, employes and other representatives, be enjoined, inhibited and restrained, and they are hereby enjoined, inhibited and restrained from entering upon said premises or from doing any other act in trespass upon or in violation of complainants' exclusive right to possess and operate said premises for oil and gas purposes.

(15) That complainants recover costs as against J. W. Solley, C. F. Johnson and Walter Hennig, and The Ohio Oil Company, defendants, and that execution issue therefor.

And afterwards, on, to-wit, August 15, 1911, came the defendants, James A. Smith, J. W. Solley, C. F. Johnson and Walter Hennig and filed in the office of the Clerk of said Court, their assignment of errors intended to be urged by them on Appeal, in the words and figures following, to-wit:

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Filed Aug. 15, 1911.

THE UNITED STATES OF AMERICA:

In the Circuit Court of the United States for the Eastern District of Illinois.

No. 331. In Chancery.

JOSEPH F. GUFFEY, A. S. GUFFEY, E. N. GILLESPIE, and ROBERT Pitcairn, Jr., Copartners Trading as Guffey, Gillespie, and Pitcairn, Complainants,

VS.

JAMES A. SMITH, H. E. WILCOX, J. W. SOLLEY, C. F. JOHNSON, Walter Hennig, The Ohio Oil Company, a Corporation; Perry A. Little, and Lewis E. Willett, Defendants.

Joint and Separate Assignment of Errors by Defendants James A. Smith, J. W. Solley, C. F. Johnson, and Walter Hennig.

In pursuance of the rules and practice of The United States Circuit Court of Appeals for the Seventh Circuit, and of the statutes in such case made and provided, come now the defendants, James A. Smith, J. W. Solley, C. F. Johnson and Walter Hennig, by their

solicitor, Jay A. Hindman, and jointly, wherein their rights are jointly effected, and severally wherein their rights are severally effected, respectfully make the following assignment of errors in the above entitled cause, and say that the Circuit Court of the United States for the Eastern District of Illinois committed manifest error against them jointly and severally in said cause, in these particulars, to-wit:

First. In dismissing the exceptions filed by these defendants to the Master's Report and in approving, adopting and confirming said report as the findings of the court in said cause.

Second. In holding that the oil and gas lease given by James A. Smith to M. A. Walton, dated May 22nd, 1905, is, and since
571 its execution and delivery has been, a valid, subsisting, enforceable and assignable contract.

Third. In holding that in and by virtue of said lease, complainants have owned and held, and do now own and hold the exclusive right and privilege to explore and operate said premises in the lease described for oil and gas purposes, and are entitled to enter and take immediate possession of said premises for the purpose of operating and exploring the same for oil and gas purposes.

Fourth. In holding that the oil and gas lease given by Susannah Smith to C. E. Allison, dated August 9th, 1906, and thereafter assigned to J. W. Solley, and C. F. Johnson for the use of themselves and Walter Hennig, and leasing the same premises for oil and gas purposes, is null and void, and of no legal effect as against the rights of complainants under their said lease, and in no way excuses or justifies the entry, possession and operation of said premises by the defendants, J. W. Solley, C. F. Johnson and Walter Hennig, or their predecessors in title, for oil and gas purposes.

Fifth. In decreeing that the defendants, J. W. Solley, C. F. Johnson and Walter Hennig be enjoined from in any manner interfering with the complainants or their agents or representatives in entering upon said premises and possessing, developing and operating the same for oil and gas purposes.

Sixth. In decreeing that the defendant, James A. Smith be enjoined from aiding, assisting, or abetting the defendants, J. W. Solley, C. F. Johnson and Walter Hennig or any of them, in taking or keeping possession of said premises against the rights or claims of complainants, or from preventing complainants from entering upon and operating said premises for oil and gas purposes.

Seventh. The defendant, J. W. Solley says that the court erred in decreeing that he pay over to complainants the proceeds of the oil received by him prior to and including August 10th, 1910, from The Ohio Oil Company, with interest thereon from that date.

Eighth. The defendant, C. F. Johnson says that the court erred in decreeing that he pay over to the complainants the proceeds of the oil received by him prior to and including August 10th, 1910, from The Ohio Oil Company, with interest thereon from said date.

Ninth. The defendant, Walter Hennig says that the court erred in decreeing that he pay over to complainants the proceeds of the

oil received by him prior to and including August 10th, 1910, from The Ohio Oil Company, with interest thereon from said date.

Tenth. The defendant, James A. Smith says that the court erred in decreeing that he pay over to complainants the difference between the proceeds of one-sixth and one-eighth royalty of oil actually received by the said Smith, the same being the sum of \$112.72, with interest thereon from August 10th, 1910.

Eleventh. The defendants, J. W. Solley, C. F. Johnson and Walter Hennig say that the court erred in decreeing that a further accounting be had between them and the complainants for the oil and its proceeds produced from said premises since August 10th, 1910.

Twelfth. The defendants, J. W. Solley, C. F. Johnson and Walter Hennig say that the court erred in decreeing that they are not entitled to any set-off or allowance for expenditures made and the value of improvements placed upon said premises.

Thirteenth. The defendants, J. W. Solley, C. F. Johnson and Walter Hennig say that the court erred in decreeing that after thirty days commencing with the entering of the decree, they and their agents, servants, employees and other representatives be enjoined, inhibited and restrained from entering upon said premises to operate the same for oil and gas purposes.

Fourteenth. Said defendants say that the court erred in decreeing that the complainants recover costs as against them.

Fifteenth. These defendants say that the court erred in decreeing that they be required to pay to the complainants interest at the rate of five per centum (5%) on the respective amounts received by them respectively from the Ohio Oil Company for the sale of oil from said premises, from the 10th day of August, 1910.

Sixteenth. That the court erred in not sustaining their first exception to the conclusion of law numbered one (1) in the Master's original report, to wit, "That the oil and gas lease entered into between M. A. Walton and James A. Smith on the 22nd day of May, 1905, is a valid, enforceable contract, entered into for a valuable consideration, and binding between the parties," and in not holding that said lease is not enforceable in a court of equity at the instance of the complainants, as requested by these defendants in said exception.

Seventeenth. That the court erred in not sustaining the Fifth exception to the Master's original report, to wit:

"These defendants except to the conclusion of law numbered Seven (7) in said original report, to wit: 'That as against the defendants, Solley, Johnson and Hennig, the complainants are entitled to an injunction restraining the said Solley, Johnson and Hennig or their agents, employees, representatives or any person acting for them, from in any manner interfering with the complainants' entering upon said premises and developing the same for oil and gas,' for the reason that said lease through which the complainants claim title to the leasehold in controversy is not enforceable in a court of equity for the reason that its terms are inequitable; that it was executed without sufficient consideration; that it lacks mutuality; be-

cause of the failure of the complainants to comply with its terms in the drilling of a well upon the premises within the time required, and of their failure to pay the stipulated penalty for such failure."

Eighteenth. That the court erred in not sustaining their Ninth exception to the conclusions of law stated by the Master in his original report, to wit:

"The defendants, Solley, Johnson and Hennig, except to the conclusion of law numbered Nine (9) in the Master's original report, to wit: 'That the said complainants, as against the defendants, Solley, Johnson and Hennig, are entitled to an accounting in equity for the value of the oil and gas taken from said premises during the time they have been developing the same,' for the following reasons:

(a) That the lease owned by the complainants and upon which they base this action, is not enforceable in a court of equity.

(b) If the lease owned by the complainants were equitable and enforceable in this action, it would not entitle the complainants to such an accounting, because under said lease the complainants did not acquire any title to the oil or gas, but merely a right to reduce the same to possession.

(c) The lease of the complainants, if valid and enforceable, does not even purport to grant either the oil or gas to the complainants, but merely gives them a right to explore for and to reduce the same to possession; that if they have been damaged by the acts of the defendants, the measure of that damage is not the value of the oil and gas produced, but, if damaged at all, no evidence was introduced showing such damage or to what extent they were damaged, and said conclusion of law is therefore erroneous."

(d) If the complainants have sustained any damage, by the act of the defendants, such damage is recoverable only in an action at law, and not in a court of equity.

Nineteenth. The defendant, James A. Smith says that the court erred in not sustaining the fifteenth exception addressed to the finding numbered Ten (10) of the Master's supplemental report, to wit:

"The defendant, James A. Smith, excepts to the finding numbered Ten (10) of the supplemental report in this, that in said finding, the Master states that said defendant is liable to account to the complainants for the one twenty-fourth of the value of the oil produced from his land, in the sum of \$112.72 for the following reasons:

(a) That the lease held by the complainants is not enforceable as against her for want of consideration and for want of mutuality; that the said lease was forfeited by reason of the failure of the complainants to comply with its terms; that said lease is inequitable in its provisions and to enforce the same would be unconscionable.

(b) That the lease held by the complainants did not convey to them the oil and gas in place, but gave to them only the right to explore for oil and gas and to reduce the same to possession, which the complainants failed and refused to do. That since the complainants did not reduce any oil or gas to possession, they never became the owners thereof, and are not entitled to receive pay for the same.

(c) That if the complainants have received any damage by reason

of the operation upon the premises, and the production of oil therefrom, the remedy for such damage may be obtained only in an action at law, and not in a suit in equity."

Twentieth. These defendants say that the court erred separately in each of these particulars, to wit: On overruling each exception filed by these defendants to the Master's report, and in not dismissing the complainants' bill for want of equity.

Wherefore, These defendants pray that the decree rendered herein be in all things reversed, and that said cause be remanded
575 with instruction to the court below to dismiss the bill of complaint filed herein at the cost of the complainants, and they will ever pray.

JAMES A. SMITH,
J. W. SOLLEY,
C. F. JOHNSON, AND
WALTER HENNIG,
By JAY A. HINDMAN,
Their Solicitor.

And afterwards on, to-wit, August 15, 1911, came the defendant, The Ohio Oil Company and filed in the office of the Clerk of said Court, its assignment of errors intended to be urged by it on Appeal, in the words and figures following, to-wit:

UNITED STATES OF AMERICA:

In the Circuit Court of the United States for the Eastern District of Illinois.

No. 331.

JOSEPH F. GUFFEY, A. S. GUFFEY, E. N. GILLESPIE, and ROBERT Pitcairn, Jr., Copartners Trading as Guffey, Gillespie & Pitcairn,

vs.

JAMES A. SMITH, H. T. WILCOX, J. W. SOLLEY, C. F. JOHNSON, Walter Hennig, The Ohio Oil Company, a Corporation; Perry A. Little, and Lewis E. Willett.

Assignment of Errors by Defendant The Ohio Oil Company, a Corporation.

Comes now the defendant, The Ohio Oil Company, a corporation, by its solicitors and says that the Circuit Court of the United States for the Eastern District of Illinois, committed manifest error against the said defendant, The Ohio Oil Company, a corporation, in said cause in this:

First. The Court erred in rendering a decree against the defendant, The Ohio Oil Company, and in decreeing that the said
576 defendant pay over to the complainants the value of the oil received by it prior to and including August 10th, 1910,

viz;—the sum of Twenty-three Thousand Eight Hundred Seven and Twenty-four Hundredths Dollars (\$23,807.24), with interest thereon at Five per cent. (5%) from August 10th, 1910.

Second. The Court erred in rendering a decree against the defendant, The Ohio Oil Company, and in decreeing that the said defendant pay over to complainants the value of the oil received by it prior to and including August 10th, 1910, viz;—the sum of Twenty-three Thousand Eight Hundred Seven and Twenty-four Hundredths Dollars (\$23,807.24), with interest thereon at Five per cent. (5%) from August 10th, 1910, provided, however, that if the defendants, J. W. Solley, C. F. Johnson and Walter Hennig, or any of them, shall pay to said complainants the amounts herein decreed to be paid by them respectively, or any part thereof, the amount so paid shall be deducted or credited upon any execution issued against The Ohio Oil Company for the enforcement of payment; that no execution shall be issued against The Ohio Oil Company until after the expiration of Forty (40) days from the entry of this decree; that the defendant The Ohio Oil Company, is and shall be entitled to execution in its behalf against its said co-defendants, J. W. Solley, C. F. Johnson and Walter Hennig, or either of them, for the respective portions of said sum of Twenty-three Thousand Eight Hundred Seven and Twenty-four Hundredths Dollars (\$23,807.24), mentioned in this decree, with interest at the rate of five per cent (5%) from August 10th, 1911, to be paid by each of said defendants, J. W. Solley, C. F. Johnson and Walter Hennig, to the complainants; and that the defendant, The Ohio Oil Company, is hereby subrogated to all the rights of the complainants for any and all sums of money which it shall pay to the complainants on any of the judgments herein mentioned, in favor of the complainants, against said J. W. Solley, C. F. Johnson and Walter Hennig, or either of them.

Third. The Court erred in making, rendering and entering a decree in this cause, decreeing that the defendant, The Ohio Oil Company, be equally liable to the complainants with the defendant, J. W. Solley, C. F. Johnson and Walter Hennig, for the said sum of Twenty-three Thousand Eight Hundred Seven and Twenty-four Hundredths Dollars (\$23,807.24),

Fourth. The court erred in rendering a decree that a further accounting be had between complainants and J. W. Solely, C. F. Johnson, Walter Hennig and The Ohio Oil Company, for the oil and its proceeds, produced from said premises, commencing at midnight of August 10th, 1910, during such time as defendants shall remain in possession thereof, such account to be governed by the same principles and rules which have been applied in ascertaining the amounts due and payable by said defendant respectively to complainants in the accounting already stated, and upon which this decree is, in part, based:—

Fifth. The Court erred in rendering a decree against the defendants, J. W. Solley, C. F. Johnson and Walter Hennig, that said defendants are not entitled to any set-off, or allowance, for expenditures made, and value of improvements placed upon said premises.

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nig, or their agents, employees, representatives, or any person acting for them, from in any manner interfering with the complainants entering upon said premises, and developing the same, for oil or gas purposes.

3rd. That as against the defendants, James A. Smith and Susannah Smith, in the respective suits, they should be enjoined from assisting or aiding the said Solley, Johnson and Hennig from keeping possession of said premises, under their said leases, as against the rights of the said Guffey, Gillespie & Piteairn.

4th. That said complainants, as against the defendants, Solley, Johnson and Hennig, are entitled to an accounting in equity for the value of the oil and gas taken from said premises during the time they have been developing the same.

5th. That the Ohio Oil Company, up to the 10th day of August, 1910, has received from the real estate of the said James A. Smith, exclusive of the royalty due to the said James A. Smith, oil or oil products of the value of \$23,146.36.

6th. That the Ohio Oil Company has paid to J. W. Solley on account of his pretended interest in said oil wells the sum of \$6,108.26; that said Ohio Oil Company, on the 10th day of August, 1910, had still in its hands the sum of \$3,458.69, still due and owing to said J. W. Solley, for oil produced upon the property of the said James A. Smith.

7th. That up to the 10th day of August, 1910, the said Ohio Oil Company had paid to C. F. Johnson on account of his pretended interest in the oil derived from the real estate of the said James A. Smith, as claimed by him, the sum of \$4,504.80, and that the Ohio Oil Company still retained in its possession, at that time, to the credit of the said C. F. Johnson, the sum of \$2,769.87.

8th. That the said Ohio Oil Company has paid to

the defendant, Walter Hennig, on account of his working interest in the oil derived from the real estate of said James A. Smith in question, the sum of \$3,990.20, and that it still retains in its possession and credited to him, on its books, the sum of \$341.53.

9th. That the said Ohio Oil Company has paid to one M. Ellis, a person not a party in this suit, but who claims to have acquired an interest in the property in question, the sum of \$1,973.74, and still has in its hands and credited on its books to him, the sum of \$26.26.

10. That each of the said defendants, J. W. Solley, C. F. Johnson and Walter Hennig, should account to the complainants, Guffey, Gillespie and Pitcairn, for the several items of money respectively received by them, as above found, from the Ohio Oil Company, and that the Ohio Oil Company should account to the said complainants, Guffey, Gillespie and Pitcairn, for the several sums of money that it still retains in its possession, and credited as owing to the several defendants above named, and also to account for the sums of money paid to said M. Ellis.

11th. That the oil and gas lease obtained by the complainants, Guffey, Gillespie and Pitcairn, provided for the payment of one-eighth royalty to the said James A. Smith, and that the lease under which the defendants operated provided for the payment of one-sixth of the oil produced, as royalty to the owner of the land, and that the Ohio Oil Company is liable to account to the complainants for the difference of the value of the royalty paid; that is to say, the Ohio Oil Company is liable to account to the complainants for the one-twenty-fourth of the value of the oil produced, on which a one-sixth royalty was set aside for the owners of the land, since it was notified of the claim of the complainants, said sum being still held by the Ohio Oil Company.

12th. That the oil and gas lease obtained by the

complainants, provided for a one-eighth royalty to the owner of the land, and that the lease under which the defendants, Solley, Johnson and Hennig, operated, provided for the one-sixth of the oil produced as royalty to the owner of the land, and that under this lease, for a time, the defendant, James A. Smith, received royalty on the basis of one-sixth of the oil produced, and that the said James A. Smith is liable to account to the complainants for the difference in the value of the royalty paid during the time he actually received it; that is to say, the said James A. Smith is liable to account to the complainants for one-twenty-fourth of the value of the oil produced on his land, on which a royalty of one-sixth was paid to him by the Ohio Oil Company; and the master further finds that this difference in the royalty is \$112.72, for which he should account to the complainants.

13th. That the defendants, Solley, Johnson and Hennig, have placed certain improvements upon the real estate in question, covered by the lease in controversy in this case, in the way of placing thereon certain oil and gas wells, certain well rigs, pipe lines, shackle rods, pumping apparatus, and other machinery used in and about the production of crude oil, and that the value of such improvements upon the land of the said James A. Smith is found to be the sum of \$14,558.55, for which he finds they should receive no credit. (Tr. in cause No. 1856, pp. 430-446-527-530.)

14th. That inasmuch as the defendants entered upon the real estate in question without lawful authority and with notice of the lease owned by the complainants, Guffey, Gillespie and Piteairn, that the defendants are not entitled to set off the amount above found against the value of the oil produced and taken from said premises, but that the defendants, Solley, Johnson and Hennig, should be permitted to remove from said real estate all

personal property and fixtures of a removable nature, but not any of the permanent improvements placed thereon by them.

15th. That in case the defendants, J. W. Solley, C. F. Johnson and Walter Hennig, do not account to the complainants, Guffey, Gillespie and Pitcairn, for the value of the oil and petroleum products received by them from the Ohio Oil Company, then and in that case, the said Ohio Oil Company should be required to account to the complainants for such money paid out by it to said defendants.

16th. That the complainants are entitled to an accounting against the defendants, C. F. Johnson, J. W. Solley, Walter Hennig, James A. Smith and the Ohio Oil Company, and that the defendants, J. W. Solley, C. F. Johnson and Walter Hennig are not entitled to any credit for any permanent improvements placed by them upon the lands in controversy covered by the oil and gas lease in this case. (In cause No. 1856, pp. 527-530.)

As to the land owned by the defendant, Susannah Smith, the master made the same findings except as to the several amounts which are the following:

The master finds that the Ohio Oil Company, up to the 10th day of August, 1910, had received from the real estate of Susannah Smith in controversy, exclusive of royalty due her, oil or oil products of the value of \$41,941.17.

That the Ohio Oil Company has paid to J. W. Solley, the sum of \$15,642.63, and has on its books to his credit, on account of oil sold the sum of \$3,299.08.

That said company has paid to C. F. Johnson, the sum of \$12,918.16, and has on its books to his credit the sum of \$2,760.34.

That said company has paid to Walter Hennig, the sum of \$4,998.28 and has upon its books to his credit the sum of \$299.01.

That said company has paid to M. Ellis the sum of \$1,996.93 and has on its books to his credit the sum of \$26.74.

That Susannah Smith has received from the Ohio Oil Company the difference between a one-eighth royalty and a one-sixth royalty in the sum of \$582.09, for which she is required to account to the complainants.

That the defendants, Solley, Johnson and Hennig, have placed upon the land of Susannah Smith improvements of the value of \$14,440.29, for which he finds they should receive no credit. (Tr. in cause No. 1857, pp. 526-530.)

Exceptions to Master's Report.

To the reports of the master, these defendants filed exceptions in these respective cases. Said exceptions being identical in all essential respects, in the economy of time, reference is made only to those filed in but one case which, omitting the formal parts, are the following:

Come now Susannah Smith, J. W. Solley, C. F. Johnson and Walter Hennig, defendants in the above entitled cause, and jointly and severally except to the report of the Master in Chancery in said cause, said report being composed of an original report filed by said Master in Chancery on the 24th day of December, A. D., 1909, together with a subsequent and supplemental report filed in said cause by said Master, by which subsequent and supplemental report said original report, as changed and modified, is adopted and made a part thereof.

Said defendants except to said report so constituted and composed, and to the finding of facts and conclusions of law therein found and stated, and say that said Master committed error therein in each of the following particulars, to-wit:

FIRST.

For that said Master, in his original report, in find-

ing numbered SIX (6) thereof, found and stated conclusions and not facts and the whole of said finding is based upon incompetent testimony admitted over the objection of these defendants, which testimony was in relation to certain customs of persons engaged in the business of producing oil.

Whereas, the rights of the parties to this action are fixed and determined by contract, and not by custom, and the Master should not have received and considered said incompetent testimony upon which said finding is based.

SECOND.

For that said Master in his said original report in finding numbered SIX (6) thereof, erroneously found, as a fact proven, that oil and gas leases containing a "surrender clause" are very generally, if not universally used, especially in leasing what is commonly called "wild cat" territory, and that oil and gas are found stored and confined in certain kinds of sand at considerable distance beneath the surface of the earth; that the presence of oil and gas in paying quantities can only be ascertained to a certainty by drilling; that the drilling of such wells is a very expensive method of search and is, by the terms of such leases, borne by the operator; that the usual custom of exploring for oil or gas in "wild cat" or undeveloped territory is for the operator, if possible, to obtain a very large block of territory to be explored for oil or gas; that he begins with a test well and can then go on drilling in different directions as signs of oil or gas improve; that if he has a small amount of territory and he should discover oil near the edge of his block of leases other operators can lease adjacent lands and obtain substantial benefits from his operations; that in exploring for oil or gas, in new territory, it is customary to drill only one well at a time as the information gained by drill-

ing each well is of advantage in locating the next well; that in many parts of the country, it has been found impracticable to drill in winter or spring on account of the impassable condition of the country roads for heavy traffic; that other conditions have rendered it customary for oil operators to secure as large a block of leases as possible and to provide in the lease for either the drilling of the well or the payment of the rental in case of a failure to drill; that the object of the "surrender clause" is to allow the operator to cancel his block of leases or any part of it at any time; that land may be tested and found unproductive of oil or gas, and the land can then be surrendered to the owner; that the rental provided for keeps on accruing until the time of the drilling of the well or the cancellation of the lease and in a large block of leases the expense of paying rentals amounts to a great deal, that since the object of the lease is to explore for oil and gas, it does not appear that after the field has been tested, and found unproductive, that the presence of said "surrender clause" is an inequitable provision.

Whereas, there is no evidence showing that the conditions assumed in said finding, exist in this case; and if they were shown to exist, they could not affect the rights of the parties to this action, for such rights are fixed and determined by contract and not by the mere wish, desire, habit, custom or practice of persons engaged in said business, nor by the condition of the roads in winter or any season of the year; that whatever may be the wish, desire, habit, custom or practice in said business, such could not render an invalid contract valid, nor change the contractual relations between the parties; that said finding is based upon and deduced from incompetent and improper testimony admitted over the objection of these defendants which should have been excluded and not considered by the Master in formulating his report.

THIRD.

These defendants further except to said finding numbered SIX (6) for the reason that said finding is based upon and deduced from the incompetent and improper testimony of John R. Penn, Andrew Bruner, J. H. Faubel, William Flynn, John H. Carter, A. B. Dally, John Worthington and other expert witnesses as to the use, purpose and effect of what is known as a "surrender clause" commonly found in oil and gas leases, and that it was upon such incompetent and improper testimony that the Master based his conclusion of law numbered ONE (1) "that the oil and gas lease entered into between M. A. Walton and Susannah Smith on the 22nd day of May, 1905, is a valid, enforceable contract entered into for a valuable consideration and binding upon the parties."

FOURTH.

These defendants except to finding of fact numbered SEVEN (7) of said original report wherein the Master states as a fact found, that the complainants have paid all of the rentals required by the lease to be paid, but fails to find when, how or to whom such payments were made; while in fact, the evidence showed that said rentals were deposited in the Exchange Bank of Martinsville, Illinois, and that no such deposit was made until long after such rentals became due by the terms of the lease, and not until after the premises in controversy had been subsequently leased to another party for oil and gas purposes, and not until after a well was in process of construction under said subsequent lease; that none of the defendants had any knowledge of the depositing of said rentals until long after the premises had been developed and oil produced under the C. E. Allison lease which is now owned by the defendants, Solley, Johnson and Hennig; that defendant Smith, has not accepted said rentals

or any part thereof and the Master committed error in not so finding as requested by these defendants.

AS TO THE CONCLUSIONS OF LAW.

FIRST.

These defendants except to the conclusion of law numbered ONE (1) in the Master's original report, to-wit: "That the oil and gas lease entered into between M. A. Walton and Susannah Smith on the 22nd day of May, 1905, is a valid, enforceable contract, entered into for a valuable consideration, and binding between the parties."

Whereas, instead of said conclusion of law, the Master should have found and stated the following conclusion requested by these defendants: "That said oil and gas lease entered into between M. A. Walton and Susannah Smith on the 22nd day of May, 1905, and which is now owned by the complainants herein and forms the basis of their right of action in this cause, is not enforceable in a court of equity at the instance of the complainants."

These defendants except to the said conclusion as stated by the Master, and also except to the refusal of the Master to state said conclusion as requested by these defendants.

SECOND.

These defendants further except to said conclusion of law numbered ONE (1) in the Master's original report, to-wit: "That the oil and gas lease entered into between M. A. Walton and Susannah Smith on the 22nd day of May, 1905, is a valid and enforceable contract entered into for a valuable consideration and binding between the parties," for the reason that said lease was executed without a sufficient consideration; that it lacks

mutuality; that it is unfair and inequitable and not enforceable in a court of equity.

THIRD.

These defendants except to the conclusions of law found and stated by the Master in his original report in this, that the Master refused to find and state as a conclusion of law that said oil and gas lease entered into between M. A. Walton and Susannah Smith on the 22nd day of May, 1905, is not enforceable in a court of equity, as requested by these defendants.

FOURTH.

These defendants except separately to each the 2nd, 3rd, 4th and 5th conclusion of law stated by the Master in his original report, for the reason that they are each and all irrelevant, immaterial and not pertinent to a correct decision of this case.

FIFTH.

These defendants except to the conclusion of law numbered SEVEN (7) in said original report to-wit: "That as against the defendants, Solley, Johnson and Hennig the complainants are entitled to an injunction restraining the said Solley, Johnson and Hennig or their agents, employees, representatives or any person acting for them, from in any manner interfering with the complainants entering upon said premises and developing the same for oil and gas," for the reason that said lease through which the complainants claim title to the leasehold in controversy, is not enforceable in a court of equity for the reason that its terms are inequitable; that it was executed without sufficient consideration; that it lacks mutuality; because of the failure of the complainants to comply with its terms in the drilling of a well upon the

premises within the time required, and of their failure to pay the stipulated penalty for such failure.

SIXTH.

These defendants except to the refusal of the Master to find and state the following conclusion requested by these defendants: "That the complainants are not entitled to an injunction or to any other relief prayed for and the bill should be dismissed for want of equity." The Master finds in his SEVENTH conclusion of law, "That as against the defendants, Solley, Johnson and Hennig, the complainants are entitled to an injunction restraining the said Solley, Johnson and Hennig, or their agents, employees, representatives or any person acting for them, from in any manner interfering with the complainants entering upon said premises and developing the same for oil and gas."

SEVENTH.

These defendants except to the refusal of the Master to find and state the following conclusion of law requested by these defendants: "That as against the defendant, Susannah Smith, the complainants are not entitled to the relief prayed for, or any part thereof, and the bill should be dismissed for want of equity."

EIGHTH.

These defendants except to the conclusion of law numbered EIGHT (8) in said original report, to-wit: "That as against the defendant, Susannah Smith, she should be enjoined from assisting or aiding said Solley, Johnson and Hennig from keeping possession of said premises under their lease as against the rights of the said Guffey, Gillespie and Piteairn," for the reason that said Guffey, Gillespie and Piteairn have no right to or interest in said premises which are enforceable in a court of equity.

NINTH.

The defendants Solley, Johnson and Hennig except to the conclusion of law numbered NINE (9) in the Master's original report, to-wit: "That the said complainants, as against the defendants, Solley, Johnson and Hennig, are entitled to an accounting in equity for the value of the oil and gas taken from said premises during the time they have been developing the same," for the following reasons:

(a) The lease owned by the complainants and upon which they base this action, is not enforceable in a court of equity.

(b) If the lease owned by the complainants were equitable and enforceable, in this action, it would not entitle the complainants to such an accounting, because under said lease the complainants did not acquire any title to the oil or gas, but merely a right to explore for the same and to reduce the same to possession.

(c) The lease of the complainants if valid and enforceable, does not even purport to grant either the oil or gas to the complainants, but merely gives them the right to explore for and to reduce the same to possession; and if they have been damaged by the acts of the defendants, the measure of that damage is not the value of the oil and gas produced, but if damaged at all, no evidence was introduced showing such damage or to what extent they were damaged and said conclusion is therefore erroneous.

(d) If the complainants have sustained any damage by any act of the defendants, such damage is recoverable only in an action at law, and not in a court of equity.

TENTH.

These defendants, Solley, Johnson and Hennig, except to the refusal of the Master to find and state the follow-

ing conclusion of law requested by said defendants: "As against the defendants, Solley, Johnson and Hennig, the complainants are not entitled to an accounting or any other relief prayed for and the bill should be dismissed for want of equity.

ELEVENTH.

These defendants except to finding numbered ONE (1) in the Master's supplemental report in so far as it adopts said original report filed by him in this case on the 24th day of December, 1909, for the reason that said original report so adopted and made a part of said supplemental report is erroneous in each and all of the particulars stated in the foregoing exceptions, and that said report should have been changed, modified and corrected as in said exceptions indicated before being adopted as a part of said supplemental report.

TWELFTH.

These defendants except to the refusal of the Master to find and state the following finding of fact, in his supplemental report, which was requested by these defendants:

"That the oil produced from the premises in controversy was all produced by these defendants, Solley, Johnson and Hennig, from wells constructed by them and at their cost and expense; that the complainants never took possession of the premises in controversy, and never expended any money in developing said premises for the discovery of oil thereon, and never at any time produced either oil or gas therefrom, and never had possession of any oil or gas produced from said premises."

Whereas, the Master found in his supplemental report in finding numbered TWO (2) thereof, "that from the wells placed upon the property in question oil was produced and conducted to tanks of the Ohio Oil Company

by means of a certain pipe line, and that the Ohio Oil Company purchased said oil and paid the defendants, J. W. Solley, C. F. Johnson and Walter Hennig for certain portions of the oil," but failed and refused to find by whom said oil was produced which was so conducted to the tanks of the Ohio Oil Company for which payment was made to said defendants.

THIRTEENTH.

These defendants except to finding of fact number THREE (3) of the supplemental report of the Master, for that the Master finds that the Ohio Oil Company up to the 10th day of August, 1910, had received from the real estate of Susannah Smith in controversy, exclusive of royalty to her, oil or oil products of the value of \$41,-941.17 but failed to find and state by whom and at whose expense said oil was produced, although requested to do so by the defendants.

Whereas, said oil was all produced by the defendants, Solley, Johnson and Hennig, and at their expense, and the Master erred in not so finding.

FOURTEENTH.

The defendants, Solley, Johnson and Hennig, except to finding numbered EIGHT (8) in said supplemental report, to-wit: "That each of the said defendants, J. W. Solley, C. F. Johnson and Walter Hennig, should account to the complainants, Guffey, Gillespie and Piteairn, for the several items of money respectively received by them, as above found, from the Ohio Oil Company, and that the Ohio Oil Company should account to the complainants, Guffey, Gillespie and Piteairn, for the several sums of money that it still retains in its possession and credited as owing to the several defendants above named, and also account for the sums of money paid to said M. Ellis," for the following reasons:

(a) That the lease owned by the complainants is not enforceable in a court of equity because it is inequitable; that it was given without sufficient consideration; and for want of mutuality.

(b) That if the lease owned by the complainants were valid and enforceable, it gave to the complainants the right to explore for oil and gas and to reduce the same to possession, and did not vest in them the title to or ownership of the oil and gas in place.

(c) That title to the oil and gas produced from the premises in controversy having never been in the complainants, they are not entitled to an accounting for the same, as against these defendants, but if the complainants have any remedy, it is in an action at law to recover such damages as they may have sustained by reason of their having been deprived of the right given them by the terms of the lease, namely, the right to explore for oil and gas, if they were deprived of such right.

(d) If the complainants have sustained any damage by reason of any acts of the defendants, the measure of such damage is not the value of the oil and gas taken from the premises by the defendants, but such as might be proved in a court of law.

FIFTEENTH.

The defendant, Susannah Smith, excepts to finding numbered TEN (10) of said supplemental report in this, that in said finding, the Master states that said defendant is liable to account to the complainant for one-twenty-fourth of the value of the oil produced on her land in the sum of \$582.09, for the following reasons:

(a) That the lease held by the complainants is not enforceable as against her for want of consideration and for want of mutuality; that said lease was forfeited by reason of the failure of the complainants to comply with

its terms; that said lease is inequitable in its provisions and that to enforce the same would be unconscionable.

(b) That the lease held by the complainants did not convey to them the oil and gas in place, but gave to them only the right to explore for oil and gas and to reduce the same to possession, which the complainants failed and refused to do. That since the complainants did not reduce any oil or gas to possession, they never became the owners thereof, and are not entitled to receive pay for the same.

(c) That if complainants have received any damage by reason of the operations upon the premises, and the production of oil therefrom, the remedy for such damage may be obtained only in an action at law and not in a suit in equity.

SIXTEENTH.

The defendants, Solley, Johnson and Hennig, except to finding numbered TWELVE (12) of the Master's supplemental report in this, to-wit: "The Master finds that the defendants entered upon the real estate in question without lawful authority, and with notice of the lease owned by the complainants," which finding is not sustained by the evidence but on the contrary the evidence shows that these defendants entered upon said premises in good faith and without any knowledge of the existence of the lease held by the complainants and that they had no knowledge of the existence of such lease until this action was brought in the Circuit Court of Crawford County, Illinois.

SEVENTEENTH.

These defendants except to the refusal of the Master to find that the lease by them owned was purchased by them in good faith and without any knowledge of the existence of the lease owned by the complainants and that these defendants had no knowledge of the existence of the complainants' lease until they were served with pro-

cess from the Circuit Court of Crawford County, Illinois, when this action was brought in said court, as requested by these defendants.

EIGHTEENTH.

These defendants further except to said finding numbered TWELVE (12) in this particular: That the Master finds "That said defendants are not entitled to set off the amount above found against the value of the oil produced and taken from said premises."

Whereas, the Master should have found that these defendants are entitled to set off the cost of the permanent improvements placed upon said premises by these defendants and the cost of producing the oil sold by them, against the amount received by them from the sale of said oil, as requested by these defendants.

NINETEENTH.

For that in finding numbered THIRTEEN (13) in the Master's supplemental report, the Master finds and states the following: "The Master further finds as a matter of law, that the complainants are entitled to an accounting against the defendants, C. F. Johnson, J. W. Solley, Walter Hennig, Susannah Smith and the Ohio Oil Company and that the defendants, J. W. Solley, C. F. Johnson and Walter Hennig are not entitled to any credit on account of any permanent improvement placed by them upon the lands in controversy covered by the oil oil and gas lease in this case."

That these defendants except to said finding for these reasons:

(a) That the complainants are not entitled to an accounting as against the defendants in this action.

(b) That if the complainants are entitled to an accounting as stated by the Master in said finding, then these defendants would be entitled to a credit for the

value of the permanent improvements by them placed upon the lands in controversy, and the master should have so found as requested by these defendants.

TWENTIETH.

These defendants except to the refusal of the Master to find and state as a conclusion of law the following conclusion requested by these defendants: "That these defendants are entitled to a credit for the value of the permanent improvements by them placed upon the lands in controversy."

Whereas, the Master found and stated in his THIRTEENTH conclusion of his supplemental report, that the defendants, J. W. Solley, C. F. Johnson and Walter Hennig are not entitled to any credit on account of any permanent improvement placed by them upon the lands in controversy covered by the oil and gas lease in this case.

TWENTY-FIRST.

These defendants except to the refusal of the Master to find and state the present value of the lease-hold in controversy, although requested to do so by these defendants; that the evidence shows said lease-hold to be of the value of Twenty Thousand Dollars, and the Master should have so found and stated in his report.

TWENTY-SECOND.

These defendants except to the report of the Master filed herein in this, that on page 18 of his original report, the Master asserts an erroneous proposition of law as follows:

"If, then, the presence of the surrender clause in the lease is a bar to the complainants' suit for injunction, it must be because the owner of the land, the complainants' lessor, is a party to the suit."

Whereas, the reason for the rule is the inherent infirmity of the instrument itself—a want of mutuality—which operates upon him who seeks to bind another while he, himself, is not bound. This infirmity renders such a contract impotent in the hands of him in whose favor the right to surrender is reserved, without respect as to the party against whom he seeks to enforce it, and the Master should have so held.

These defendants except to the report filed by the Master in this cause for the reason that said report was made under a misconception and misapplication of the law as announced and declared by the Supreme Court of the State of Illinois in the decisions of said court referred to by the Master on page 17 of his original report, to-wit: *Watford Oil and Gas Company v. Shipman et al.*, 233 Ill., 9, and *Ulry v. Keith*, 237 Ill., 284.

That in the decisions rendered in said cause it is announced and declared to be the law that leases of the character of the lease owned by the complainants and which is in controversy in this case, are not enforceable in a court of equity at the instance of one in whose favor the power of revocation exists; that the decision of said court in said cases constitute a rule of property in the State of Illinois which will be followed by this court, and the Master should have so found and held.

Whereas, the Master finds and states that the rule of law so announced and declared by the Supreme Court of said State in said cases, does not apply to this case.

WHEREFORE, These defendants respectfully ask that the report of the Master be revised, amended and corrected in the manner and in the particulars indicated by the foregoing exceptions, and that when so revised, amended and corrected, that the same be adopted and approved and judgment be rendered thereon in favor of these defendants.

Tr. pp. 532-544.

Exceptions Overruled.

In due time these causes came on to be heard upon the pleadings and the evidence and the Master's report and the exceptions thereto, and was, by agreement of counsel, submitted on printed arguments, and upon consideration thereof, the exceptions to the Master's report were overruled and the Master's Report in each case was approved and adopted as the findings of the court. Tr. p. 566.

The Decree.

Whereupon, the court rendered a decree in each of these cases in accordance with the Master's Report by which it is ordered, adjudged and decreed:

1st. That the lease owned by the complainants is valid and enforceable, and gives to the complainants the exclusive right and privilege to explore for and operate upon the premises described for oil and gas purposes.

2nd. That the lease owned by the defendants, Solley, Johnson and Hennig, is null and void and of no legal effect as against the rights of complainants.

3rd. That the leases given to H. E. Wilcox dated March 23, 1906, are null and void.

4th. That the bill be dismissed as to the defendants, Little and Willett, at the cost of the complainants.

5th. That the defendants, Solley, Johnson and Hennig, be enjoined from asserting any rights in the demised premises under their lease.

6th. That the defendant, Smith, be enjoined from aiding the defendants, Solley, Johnson and Hennig in asserting any rights in the premises, and from preventing the complainants from entering upon the premises and operating the same for oil and gas purposes.

7th. That the defendant, Solley, pay to the complainants the proceeds received by him from the sale of oil from the premises of James A. Smith, in cause No.

330, the sum of \$6,108.26, and from the premises of Susannah Smith in cause No. 331, the sum of \$15,642.63, with interest thereon at 5 percent from August 10, 1910.

8th. That the defendant, C. F. Johnson, pay the complainants the proceeds received by him from the sale of oil from the premises of James A. Smith, in cause No. 330, the sum of \$4,504.80, and from the premises of Susannah Smith, in cause No. 331, the sum of \$12,918.16, with interest thereon from August 10th, 1910.

9th. That the defendant, Walter Hennig, pay to the complainants the proceeds received by him from the sale of oil from the premises of James A. Smith, in cause No. 330, the sum of \$3,990.20, and from the premises of Susannah Smith, in cause No. 331, the sum of \$4,998.28, with interest thereon at 5 percent from August 10, 1910.

10th. That the defendant, James A. Smith, in cause No. 330, pay to the complainants the sum of \$112.72, the same being the difference between the proceeds of one-sixth and one-eighth royalty of the oil received by him, with 5 percent interest from August 10th, 1910.

That the defendant, Susannah Smith, in cause No. 331, pay to the complainants the sum of \$582.09, the same being the difference between the proceeds of one-sixth and one-eighth royalty of the oil received by her, with 5 percent interest thereon from August 10th, 1910.

11th. That the defendant, the Ohio Oil Company, pay the complainants the value of the oil received by it, prior to and including August 10th, 1910, from the premises of James A. Smith in cause No. 330, the sum of \$23,807.24, and from the premises of Susannah Smith in cause No. 331, the sum of \$42,618.07 with interest on said sum from August 10th, 1910. Provision is made for the issuing of an execution in favor of said Ohio Oil Company against the defendants, Solley, Johnson and Hennig, for such amount of said respective sums as may not be paid by said Solley, Johnson and Hennig.

12. That a further accounting be had between complainants and Solley, Johnson, Hennig and the Ohio Oil Company for the oil and its proceeds produced from the premises after August 10th, 1910.

13th. That the defendants, Solley, Johnson and Hennig are not entitled to any set-off or allowance for expenditures made and the value of the improvements placed upon the premises, but they are given thirty days in which to remove such personal property as may be removed without injury to any of the wells upon the premises. All other property including all wells, is vested in the complainants.

14th. After thirty days given in which to remove all personal property from the premises, the defendants, Solley, Johnson and Hennig, are enjoined from entering upon the premises and from doing any act not consistent with complainants' exclusive right to possession of the premises for oil and gas purposes.

15th. That complainants recover costs of defendants, Solley, Johnson, Hennig and the Ohio Oil Company. Tr. pp. 566-569.

Causes Appealed.

From the decrees so rendered these respondents appealed to the United States Circuit Court of Appeals for the Seventh Circuit.

With their petition for an appeal, these respondents filed their joint and separate assignment of errors in each case. These assignments being practically identical, we set out here only the assignment of errors filed in cause No. 331, in the lower court which, with the formal parts omitted, is as follows:

Joint and Separate Assignment of Errors.

In pursuance of the rules and practice of the United States Circuit Court of Appeals for the Seventh Circuit, and the statutes in such case made and provided, come

now the defendants, Susannah Smith, J. W. Solley, C. F. Johnson and Walter Hennig, by their solicitor, Jay A. Hindman, and jointly, wherein their rights are jointly affected, and severally, wherein their rights are severally affected, respectively make the following assignment of errors in the above entitled cause, and say that the Circuit Court of the United States for the Eastern District of Illinois committed manifest error against them jointly and severally in said cause, in these particulars, to-wit:

First. In dismissing the exceptions filed by these defendants to the Master's report, and in approving, adopting and confirming said report as the findings of the court in said cause.

Second. In holding that the oil and gas lease given by Susannah Smith to M. A. Walton, dated May 22nd, 1905, is, and since its execution and delivery has been, a valid, subsisting, enforceable and assignable contract.

Third. In holding that in and by virtue of said lease, complainants have owned and held, and do now own and hold the exclusive right and privilege to explore and operate said premises in the lease described for oil and gas purposes, and are entitled to enter and take immediate possession of said premises for the purpose of operating and exploring the same for oil and gas purposes.

Fourth. In holding that the oil and gas lease given by Susannah Smith to C. E. Allison, dated August 9th, 1906, and thereafter assigned to J. W. Solley and C. F. Johnson for the use of themselves and Walter Hennig, and leasing the same premises for oil and gas purposes, is null and void, and of no legal effect as against the rights of complainants under their lease, and in no way excuses or justifies the entry, possession and operation of said premises by the defendants, J. W. Solley, C. F. Johnson and Walter Hennig, or their predecessors in title, for oil and gas purposes.

Fifth. In decreeing that the defendants, J. W. Solley, C. F. Johnson and Walter Hennig be enjoined from in any manner interfering with the complainants or their agents or representatives in entering upon said premises and possessing, developing and operating the same for oil and gas purposes.

Sixth. In decreeing that the defendant, Susannah Smith, be enjoined from aiding, assisting or abetting the defendants, J. W. Solley, C. F. Johnson and Walter Hennig or any of them, in taking or keeping possession of said premises against the rights or claims of complainants, or from preventing complainants from entering upon and operating said premises for oil and gas purposes.

Seventh. The defendant, J. W. Solley says that the court erred in decreeing that he pay over to the complainants the proceeds of the oil received by him prior to and including the 10th day of August, 1910, from the Ohio Oil Company, with interest thereon from said date.

Eighth. The defendant, C. F. Johnson says that the court erred in decreeing that he pay over to the complainants the proceeds of the oil received by him prior to and including August 10th, 1910, from the Ohio Oil Company, with interest thereon from said date.

Ninth. The defendant, Walter Hennig says that the court erred in decreeing that he pay over to the complainants the proceeds of the oil received by him prior to and including August 10th, 1910, from the Ohio Oil Company, with interest thereon from said date.

Tenth. The defendant, Susannah Smith says that the court erred in decreeing that she pay over to the complainants the difference between the proceeds of one-sixth and on-eighth royalty of the oil actually received by her, the same being the sum of \$582.09, with interest thereon from August 10th, 1910.

Eleventh. The defendants, J. W. Solley, C. F. John-

son and Walter Hennig say that the court erred in decreeing that a further accounting be had between them and the complainants for the oil and its proceeds produced from said premises since August 10th, 1910.

Twelfth. The defendants, J. W. Solley, C. F. Johnson and Walter Hennig say that the court erred in decreeing that they are not entitled to any set-off or allowance for the expenditures made and the value of the improvements placed upon said premises by them.

Thirteenth. The defendants, J. W. Solley, C. F. Johnson and Walter Hennig say that the court erred in decreeing that after thirty days commencing with the entering of the decree, they and their agents, servants, employees and other representatives be enjoined, inhibited and restrained from entering upon said premises to operate the same for oil and gas purposes.

Fourteenth. Said defendants say that the court erred in decreeing that the complainants recover costs as against them.

Fifteenth. These defendants say that the court erred in decreeing that they be required to pay to the complainants interest at the rate of five percentum on the respective amounts received by them respectively from the Ohio Oil Company for the sale of oil from said premises, from the 10th day of August, 1910.

Sixteenth. That the court erred in not sustaining their first exception to the conclusion of law numbered one (1) in the Master's original report, to-wit: "That the oil and gas lease entered into between M. A. Walton and Susannah Smith on the 22nd day of May, 1905, is a valid, enforceable contract, entered into for a valuable consideration and binding between the parties," and in not holding that this lease is not enforceable in a court of equity at the instance of the complainants, as requested by these defendants in said exception.

Seventeenth. That the court erred in not sustaining the fifth exception to the Master's original report, to-wit:

"These defendants except to the conclusion of law numbered seven (7) in the said original report, to-wit: 'That as against the defendants, Solley, Johnson and Hennig, the complainants are entitled to an injunction restraining the said Solley, Johnson and Hennig, or their agents, employees, representatives or any person acting for them, from in any manner interfering with the complainants entering upon said premises and developing the same for oil and gas,' for the reason that said lease through which the complainants claim title to the leasehold in controversy is not enforceable in a court of equity for the reason that its terms are inequitable; that it was executed without sufficient consideration; that it lacks mutuality; because of the failure of the complainants to comply with its terms in the drilling of a well upon the premises within the time required, and of their failure to pay the stipulated penalty for such failure."

Eighteenth. That the court erred in not sustaining their ninth exception to the conclusions of law stated by the Master in his original report, to-wit:

"The defendants, Solley, Johnson and Hennig, except to the conclusion of law numbered nine (9) in the Master's original report, to-wit: 'That the said complainants, as against the defendants, Solley, Johnson and Hennig, are entitled to an accounting in equity for the value of the oil and gas taken from said premises during the time they have been developing the same,' for the following reasons:

(a) The lease owned by the complainants and upon which they base this action, is not enforceable in a court of equity.

(b) If the lease owned by the complainants were equitable and enforceable in this action, it would not enti-

tle the complainants to such an accounting, because under said lease the complainants did not acquire any title to the oil or gas, but merely a right to reduce the same to possession.

(c) The lease of the complainants, if valid and enforceable, does not even purport to grant either the oil or gas to the complainants, but merely gives them a right to explore for and to reduce the same to possession; that if they have been damaged by the acts of the defendants, the measure of that damage is not the value of the oil or gas produced, but, if damaged at all, no evidence was introduced showing such damage or to what extent they were damaged, and said conclusion of law is therefore erroneous.

(d) If the complainants have sustained any damage by any act of the defendants, such damage is recoverable only in an action at law, and not in a court of equity.

Nineteenth. The defendant, Susannah Smith says that the court erred in not sustaining the fifteenth exception addressed to the finding number ten (10) of the Master's supplemental report, to-wit:

"The defendant, Susannah Smith, excepts to the finding numbered ten (10) of the supplemental report in this, that in said finding, the Master states that said defendant is liable to account to the complainants for the one-twenty-fourth of the value of the oil produced from her land, in the sum of \$582.09, for the following reasons:

(a) That the lease held by the complainants is not enforceable as against her for want of consideration and for want of mutuality; that the said lease was forfeited by reason of the failure of the complainants to comply with its terms; that said lease is inequitable in its provisions and to enforce the same would be unconscionable.

(b) That the lease held by the complainants did

not convey to them the oil and gas in place, but gave them only the right to explore for oil and gas and to reduce the same to possession, which the complainants failed and refused to do. That since the complainants did not reduce any oil or gas to possession, they never became the owners thereof, and are not entitled to receive pay for the same.

(c) That if the complainants have sustained any damage by reason of the operations upon the premises, and the production of oil therefrom, the remedy for such damage may be obtained only in an action at law and not in a suit in equity."

Twentieth. These defendants say that the court erred separately in each of these particulars, to-wit: In overruling each exception filed by these defendants to the Master's report, and in not dismissing the complainants' bill of complaint for want of equity.

WHEREFORE, These defendants pray that the decree rendered herein be in all things reversed, and that said cause be remanded with instruction to the court below to dismiss the bill of complaint herein at the cost of the complainants, and they will ever pray.

Tr. pp. 570-575.

JAY A. HINDMAN,
Solicitor for Defendants.

These cases coming on to be heard in the Circuit Court of Appeals for the Seventh Circuit before Kohlstaad and Mack, Circuit Judges, and Sanborn, District Judge, the decrees rendered in the court below were in all things reversed, and the cases were remanded to the Circuit Court for the Eastern District of Illinois with instructions to dismiss the bills for want of equity. Tr. p.—.

These cases are now in this court on writ of *certiorari* to the Circuit Court of Appeals for the Seventh Circuit.

In support of their earnest contention that the

decrees of the lower court were erroneous and should be reversed, and that the decision of the United States Circuit Court of Appeals for the Seventh Circuit should be affirmed, these respondents respectfully submit the following Brief and Argument.

Brief of Argument.

PROPOSITION I.

Pre-Requisites to Recovery.

To warrant the granting of any of the relief sought, the complainants must not only come into court with "clean hands," but it must clearly appear that the contract upon which they base their demand for relief is one which a court of equity will enforce. They must recover, if at all, upon the strength of their own title and upon the merits of their own cause.

AUTHORITIES.

(U. S.) *Michigan Pipe Co. v. Fremont Pipe Co.*, 111 Fed. Rep., 284.

(U. S.) *Jackson v. Ashton*, 11 Peters, 229.

(U. S.) *Pope M'fg. Co. v. Gormully*, 144 U.S., 224.

(U. S.) *Federal Oil Co. v. Western Oil Co.*, 121 Fed. Rep., 675.

(U. S.) *Federal Oil Co. v. Western Oil Co.*, 112 Fed. Rep., 373.

(Mich.) *Rust v. Conrad*, 47 Mich., 449, 41 Am. Rep., 720.

High on Injunctions, (3rd Ed.) Secs. 22, 698.

Cyc. of Law and Procedure, Vol. 22, p. 749.

Am. and Eng. Enc. of Law, (1st Ed.) Vol. 10, pp. 784, 785.

PROPOSITION II.

Oil and Gas Leases,—How Construed.

Because of the peculiar character of oil and gas as "property," and the violent fluctuations in the value of

lands and leaseholds incident to the discovery of these substances, the courts have placed contracts of this kind in a class by themselves, and in the light of the known character of the business of "oil mining," construe them most strictly against the lessee and favorable to the lessor.

AUTHORITIES.

(U. S.) *Huggins v. Daley*, 99 Fed. Rep., 606, 40 C. C. A., 12, 48 L. R. A., 320.

(U. S.) *Federal Oil Co. v. Western Oil Co.*, 112 Fed. Rep., 373.

(U. S.) *Ohio Oil Co. v. Indiana*, 177 U. S., 190, 44 Law Ed., 729.

(W. Va.) *Parish Fork Oil Co. v. Bridgewater Gas Co.*, 51 W. Va., 583, 42 S. E. Rep., 655, 59 L. R. A., 566.

(W. Va.) *Steelsmith v. Gartlan*, 45 W. Va., 27, 29 S. E. Rep., 978.

(W. Va.) *Belman v. Harness*, 42 W. Va., 433, 21 S. E. Rep., 271, 36 L. R. A., 566.

(Pa.) *Venture Oil Co. v. Fretts*, 152 Pa., 451, 25 Atl. Rep., 732.

(Ill.) *Watford Oil Co. v. Shipman*, 233 Ill., 9, 84 N. E. Rep., 53.

(Okl.) *Kolachny v. Galbreath*, 26 Okl., 722, 110 Pac., 902.

Bryan on "Petroleum and Natural Gas," p. 146.

Donohue on "Petroleum and Gas," p. 149 *et sequitur*.

Thornton on "The Law Relating to Oil and Gas," p. 98 *et seq.*

PROPOSITION III.

The Contracts Are Inequitable.

The contracts upon which the complainants base these actions should not be enforced in a court of equity because they are deceptive, unjust, unequal, unfair and

inequitable; while they purport to be "for the sole and only purpose of mining and operating for oil and gas," they contain no provision requiring this "purpose" to be accomplished, but permit the complainants to hold the premises dormant for the purpose of speculation, and thus defeat the very purpose for which they were given.

AUTHORITIES.

- (U. S.) *Nash v. Towne*, 72 U. S., (5 Wall.) 689, 18 Law Ed., 527, 529.
- (U. S.) *Federal Oil Company v. Western Oil Company*, 121 Fed. Rep., 674.
- (U. S.) *Federal Oil Co. v. Western Oil Co.*, 112 Fed. Rep., 373.
- (U. S.) *Huggins v. Daley*, 99 Fed. Rep., 606, 40 C. C. A., 12, 48 L. R. A., 320.
- (U. S.) *Pope M'f'g. Co. v. Gormully*, 144 U. S., 224.
- (U. S.) *Mich. Pipe Co. v. Fremont Pipe Co.*, 111 Fed. Rep., 284, 8 Am. and Eng. Decisions in Equity, p. 186.
- (Mich.) *Rust v. Conrad*, 47 Mich., 449, 41 Am. Rep., 720.
- (U. S.) *Miss. & Mo. R. R. Co. v. Cromwell*, 91 U. S., 643.
- (U. S.) *King v. Hamilton*, 4 Pet., 311.

PROPOSITION IV.

Want of Consideration and Mutuality.

The leases owned by the complainants, and upon which they base these actions, are not enforceable in a court of equity (a) for want of Consideration, (b) for want of Mutuality of Engagement and (c) for want of Mutuality of Remedy.

(a) *WANT OF CONSIDERATION.*

The consideration for the execution of the leases in question was not the recited \$1.00, nor the 25 cents a year mentioned, but the real consideration was the development of the premises for, and if found, the production of oil and gas, and the rents and royalties resulting therefrom and dependent thereon. "If the lease fails to bind the lessee to diligent search for oil and gas, it is without consideration, binding upon neither party, and voidable at the pleasure of either."

AUTHORITIES.

- (U. S.) *Federal Oil Co. v. Western Oil Co.*, 112 Fed. Rep., 373.
- (U. S.) *Huggins v. Daley*, 99 Fed. Rep., 606, 48 L. R. A., 320.
- (U. S.) *Foster v. Elk Fork Oil Co.*, 90 Fed. Rep., 178.
- (U. S.) *Elk Fork Oil Co. v. Jennings*, 80 Fed. Rep., 839.
- (Tex.) *Natural Gas Co. v. Teel*, 67 S. W. Rep., 545, 68 S. W. Rep., 976.
- (W. Va.) *Eclipse Oil Co. v. South Penn. Oil Co.*, 47 W. Va., 84, 34 S. E. Rep., 923.
- (W. Va.) *Trees v. Eclipse Oil Co.*, 47 W. Va., 107, 34 S. E. Rep., 933.
- (W. Va.) *Parish Fork Oil Co. v. Bridgewater Gas Co.*, 51 W. Va., 583, 42 S. E. Rep., 655.
- (W. Va.) *Steelsmith v. Gartlan*, 45 W. Va., 27, 29 S. E. Rep., 978, 44 L. R. A., 107.
- (W. Va.) *Crawford v. Ritchey*, 43 W. Va., 252, 27 S. E. Rep., 220.
- (Penn.) *Venture Oil Co. v. Fretts*, 152 Pa. St., 451, 25 Atl. Rep., 732.
- (Penn.) *Cassel v. Crothiers*, 193 Pa. St., 193, 44 Atl. Rep., 446.

- (Ind.) *Gadbury v. Ohio Etc. Co.*, 162 Ind., 9, 67
N. E. Rep., 259, 62 L. R. A., 895.

(b) **WANT OF MUTUALITY OF ENGAGEMENT.**

"Contracts, unperformed, optional as to one of the parties, are optional as to both."

AUTHORITIES.

- (U. S.) *So. Express Co., v. Western N. C. R. R. Co.*,
99 U. S., 191, 25 Law Ed., 319.
- (U. S.) *United States v. Noc*, 23 Howard, 312.
- (U. S.) *Dorsey v. Packwood*, 12 Howard, 126.
- (U. S.) *Huggins v. Daley*, 99 Fed. Rep., 606, 48
L. R. A., 320.
- (U. S.) *Federal Oil Co. v. Western Oil Co.*, 121
Fed. Rep., 674.
- (U. S.) *Federal Oil Co. v. Western Oil Co.*, 112
Fed. Rep., 373.
- (U. S.) *Reece v. Zinn*, 103 Fed. Rep., 97.
- (U. S.) *Cold Blast T. Co. v. Kansas City etc. Co.*,
114 Fed. Rep., 77, 57 L. R. A., 696, 699.
- (U. S.) *Am. Cotton Co. v. Kirk*, 68 Fed. Rep., 791.
- (U. S.) *Crane v. Crane*, 105 Fed. Rep., 869.
- (Ill.) *Weaver v. Weaver*, 109 Ill., 225.
- (Ill.) *Chicago Mun. Gas Light Co. v. Town of Lake*,
130 Ill., 42, 22 N. E. Rep., 616.
- (Ill.) *Lancaster v. Roberts*, 144 Ill., 213, 33 N. E.
Rep., 27.
- (Ill.) *Vogle v. Peakoc*, 157 Ill., 339, 42 N. E. Rep.,
786.
- (Ill.) *Welty v. Jacobs*, 171 Ill., 624, 49 N. E. Rep.,
723, 40 L. R. A., 98.
- (Ill.) *East St. Louis etc. Co. v. City of E. St. Louis*,
182 Ill., 433, 55 N. E. Rep., 533.

- (Ill.) *Cleveland v. Martin*, 218 Ill., 73, 75 N. E. Rep., 772.
- (Ill.) *Bauer v. The Lumaghi Coal Co.*, 209 Ill., 316, 70 N. E. Rep., 643.
- (Ill.) *Watford Oil Co. v. Shipman*, 233 Ill., 9, 84 N. E. Rep., 53.
- (Ill.) *Cortelyou v. Barnsdall*, 236 Ill., 138, 86 N. E. Rep., 200.
- (Ill.) *Ulry v. Keith*, 237 Ill., 284, 86 N. E. Rep., 696.
- (Mich.) *Rust v. Conrad*, 47 Mich., 449, 41 Am. Rep., 720.
- (Ala.) *Iron Age Pub. Co. v. W. U. Tel. Co.*, 83 Ala., 493, 3 Am. St. Rep., 758.
- (W. Va.) *Eclipse Oil Co. v. South Penn. Oil Co.*, 47 W. Va., 84, 34 S. E. Rep., 923, 20 Mor. Min. Rep., 234.
- (W. Va.) *Snodgrass v. South Penn. Oil Co.*, 47 W. Va., 509, 35 S. E. Rep., 820.
- (La.) *Campbell v. Lambert*, 36 La. Ann., 35, 51 Am. Rep., 1.
- (W. Va.) *Steelsmith v. Gartlan*, 45 W. Va., 27, 29 S. E. Rep., 978, 44 L. R. A., 107.
- (Wis.) *Hoffman v. Maffioli*, 104 Wis., 630, 47 L. R. A., 427.
- (Tex.) *Nat. O. and Pipe Line Co. v. Teel*, 67 S. W. Rep., 545.
- (Ga.) *Luke v. Livingston*, — Georgia, —, 70 S. E. Rep., 21.
- (Ga.) *Mallet v. Watkins*, 132 Ga., 700, 64 S. E. Rep., 999.
- (Ind.) *Fowler Utility Co. v. Gray*, 168 Ind., I, 79 N. E. Rep., 897.
- (Ind.) *Gadbury v. Ohio Oil Co.*, 162 Ind., 9, 67 N. E. Rep., 259, 62 L. R. A., 895.
- Donahue on "Petroleum and Gas,"* p. 155.

Cyc. of Law and Procedure, Vol. 22, p. 950.

(c) **WANT OF MUTUALITY OF REMEDY.**

"A court of equity never interferes where the power of revocation exists."

AUTHORITIES.

- (U. S.) *Southern Express Co. v. The Western etc. R. R. Co.*, 99 U. S., 191, 25 Law Ed., 319.
- (U. S.) *Rutland Marble Co. v. Ripley*, 10 Wall., 339, 359, 19 Law Ed., 955, 961.
- (U. S.) *Federal Oil Co. v. Western Oil Co.*, 112 Fed. Rep., 373.
- (U. S.) *Federal Oil Co. v. Western Oil Co.*, 121 Fed. Rep., 674.
- (U. S.) *Kerrick v. Hannaman*, 168 U. S., 328, 336, 19 Law Ed., 955.
- (U. S.) *Reese v. Zinn*, 103 Fed Rep., 97.
- (U. S.) *Dorsey v. Packwood*, 12 Howard, 126.
- (U. S.) *Pantages v. Grauman*, 191 Fed. Rep., 318.
- (U. S.) *Shubert v. Woodward*, 167 Fed. Rep., 47.
- (U. S.) *Norris v. Fox*, 45 Fed., 406.
- (Minn.) *Alworth v. Seymore*, 44 N. W., Rep., 1,030.
- (Mich.) *Rust v. Conrad*, 47 Mich., 449, 41 Am. Rep., 720.
- (Ala.) *Iron Age Pub. Co. v. W. U. Tel. Co.*, 83 Ala., 498, 3 Am. St. Rep., 758.
- (Ind.) *Fowler Utility Co. v. Gray*, 168 Ind., 1, 79 N. E. Rep., 897.
- (Ill.) *Welty v. Jacobs*, 171 Ill., 624, 49 N. E. Rep., 728.
- (Ill.) *Watford Oil Co. v. Shipman*, 233 Ill., 9, 84 N. E. Rep., 53.
- (Ill.) *Ulry v. Keith*, 237 Ill., 284, 86 N. E. Rep., 696.

PROPOSITION V.

No Tender of Performance.

The complainants should not recover in this action for the reason that they have neither done equity by performing nor by tendering performance of the optional provisions of the lease, nor in their bill do they offer to do equity by offering to perform whatever the court shall decree ought to be done on their part.

AUTHORITIES.

- (U. S.) *Federal Oil Co. v. Western Oil Co.*, 121 Fed. Rep., 675.
- (U. S.) *Kelsey v. Crowther*, 162 U. S., 404.
- (U. S.) *Morgan v. Morgan*, 2 Wheaton, 290.
- (U. S.) *Colson v. Thompson*, 2 Wheat., 336.
- (U. S.) *Brashier v. Gratz*, 6 Wheat., 528.
- (U. S.) *Bank of Columbia v. Hanger*, 1 Pet., 455.
- (U. S.) *Purcell v. Coleman*, 4 Wall., 513.
- (U. S.) *Watts v. Waddle*, 6 Peters, 389.
- (U. S.) *Dorsey v. Packwood*, 12 How., 126.
- (U. S.) *Boon v. Missouri Co.*, 17 How., 340.
- (Ill.) *Thayer v. Wilmington*, 105 Ill., 540.
- (Ill.) *Chi. Mun. G. L. Co. v. Town of L.*, 130 Ill., 42.
- Story's Eq. Jurisprudence*, Sec. 736.
- Pomeroy's Spec. Performance*, Sec. 330.

PROPOSITION VI.

Condition Precedent.

The completion of a well upon the demised premises within the time stipulated (nine months) was a condi-

tion precedent to the vesting of any estate. And at the expiration of the time given in which to make the preliminary test, none having been made, the lessor had a right to avoid the lease by leasing to another.

AUTHORITIES.

- (U. S.) *Huggins v. Daley*, 99 Fed. Rep., 606.
 (U. S.) *Federal Oil Co. v. Western Oil Co.*, 112 Fed. Rep., 373.
 (U. S.) *Foster v. Elk Fork Oil Co.*, 90 Fed. Rep., 178.
 (W. Va.) *Parish Fork Oil Co. v. Bridgewater Gas Co.*, 51 W. Va., 583, 59 L. R. A., 566, 42 S. E. Rep., 655.
 (W. Va.) *Crawford v. Richey*, 43 W. Va., 252, 27 S. E. Rep., 220.
 (W. Va.) *Steelsmith v. Gartlan*, 45 W. Va., 27, 44 L. R. A., 107.
 (Ind.) *Gadbury v. Ohio etc. Co.*, 162 Ind., 9, 67 N. E. Rep., 259, 62 L. R. A., 895.
 (Penn.) *Oil Co. v. Fretts*, 152 Pa. St., 451.

PROPOSITION VII.

Laches.

The lease of the complainants should not be enforced in a court of equity because of the *laches* of the complainants in that they failed to carry out the purpose of the lease, but stood by awaiting the result of development by others, the fruit of whose enterprise, labor and money, they now seek to appropriate.

AUTHORITIES.

- (U. S.) *Hollingsworth v. Fry*, 4 Dal'l., 345, Book 1, Law Ed., 331.

(U. S.) *Twin Link Oil Co. v. Marbury*, 91 U. S., 593, 23 Law Ed., 331.

(U. S.) *Johnson v. Standard Mining Co.*, 148 U. S., 360, 37 Law Ed., 480.

(U. S.) *Federal Oil Co. v. Western Oil Co.*, 112 Fed. Rep., 373.

(U. S.) *Huggins v. Daley*, 99 Fed. Rep., 606, 48 L. R. A., 320.

(Pa.) *Munroe v. Armstrong*, 96 Pa. St., 307.

(Pa.) *Cassel v. Crothers*, 193 Pa. St., 359.

(Pa.) *Venture Oil Co. v. Fretts*, 152 Pa. St., 451.

(W. Va.) *Iron Co. v. Trout*, 83 W. Va., 409, 2 S. E. Rep., 713.

(W. Va.) *Steelsmith v. Gartlan*, 45 W. Va., 27.

Cyc. of Law and Procedure, Vol. 16, pp. 161, 162, 163.

Am. & Eng. Ency. of Law, (1st Ed.) Vol. 22, p. 1,043.

PROPOSITION VIII.

Oil and Gas as Property.

Oil and gas *in situ* are not capable of private ownership, but they become "property" only when reduced to possession. Title to these substances is inchoate and contingent upon their discovery and production. Leases of this character, therefore, vest in the lessee no present title to the oil and gas, but are a mere license to explore for, and, if found, to reduce the same to possession.

AUTHORITIES.

(U. S.) *Ohio Oil Co. v. Indiana*, 177 U. S., 190, 44 Law Ed., 729.

(U. S.) *Federal Oil Co. v. Western Oil Co.*, 121 Fed. Rep., 674.

- (U. S.) *Federal Oil Co. v. Western Oil Co.*, 112 Fed. Rep., 373.
- (U. S.) *Huggins v. Daley*, 99 Fed. Rep., 606, 48 L. R. A., 320.
- (U. S.) *Foster v. Elk Fork Oil Co.*, 90 Fed. Rep., 178.
- (U. S.) *Elk Fork Oil Co. v. Jennings*, 80 Fed. Rep., 839.
- (Ind.) *State v. Ohio Oil Co.*, 150 Ind., 21, 49 N. E. Rep., 809.
- (Ind.) *Heal v. Niagara Oil Co.*, 150 Ind., 482, 50 N. E. Rep., 482.
- (Ind.) *People's Gas Co. v. Tyner*, 131 Ind., 277, 31 N. E. Rep., 59, 16 L. R. A., 443.
- (Ind.) *Townsend v. The State*, 147 Ind., 624, 49 N. E. Rep., 14, 37 L. R. A., 294.
- (Ind.) *Gadbury v. Ohio Oil etc., Co.*, 162 Ind., 9, 67 N. E. Rep., 259, 62 L. R. A., 294.
- (Ind.) *Hancock v. Diamond Plate Glass Co.*, 162 Ind., 146, 70 N. E. Rep., 149.
- (Ind.) *New Am. Oil Co. v. Troyer*, 166 Ind., 402, 77 N. E. Rep., 739.
- (Penn.) *Ray v. Gas Co.*, 138 Pa. St., 576, 20 Atl. Rep., 1,065, 12 L. R. A., 290.
- (Penn.) *Dark v. Johnson*, 55 Pa., 164, 93 Am. Dec., 732.
- (Penn.) *Klepner v. Lemon*, 176 Pa. St., 502.
- (Penn.) *Brown v. Vandergriff*, 80 Pa. St., 142.
- (Penn.) *Funk v. Halderman*, 53 Pa. St., 229, 35 Atl., 109.
- (Penn.) *Keir v. Patterson*, 41 Pa. St., 357.
- (Penn.) *Jones v. Forest Oil Co.*, 194 Pa. St., 379, 14 Atl. Rep., 1,074, 48 L. R. A., 748.
- (W. Va.) *Wood Co. Pet. Co. v. W. Va. Trans. Co.*, 28 W. Va., 210, 57 Am. Rep., 659.

- (W. Va.) *Hall v. Vernon*, 47 W. Va., 295, 34 S. E. Rep., 764.
- (W. Va.) *Steelsmith v. Gartlan*, 45 W. Va., 27, 44 L. R. A., 107.
- (W. Va.) *Crawford v. Richey*, 43 W. Va., 252, 27 S. E. Rep., 220.
- (W. Va.) *Parish Fork Oil Co. v. Bridgewater Gas Co.*, 51 W. Va., 583, 42 S. E. Rep., 655.
- (W. Va.) *Iron Co. v. Trout*, 83 W. Va., 397, 2 S. E. Rep., 713.
- (W. Va.) *Guffey v. Hukill*, 34 W. Va., 49, 8 L. R. A., 759.
- (N. Y.) *Shepperd v. McCalmont Oil Co.*, 38 Hun., 37.
- (Ill.) *Watford Oil and Gas Co. v. Shipman*, 233 Ill., 9, 84 N. E. Rep., 53.
- (Ill.) *Poe v. Ulry*, 233 Ill., 56, 84 N. E. Rep., 46.
- (Ill.) *Bruner v. Hicks*, 230 Ill., 536, 82 N. E. Rep., 888.
- (Ill.) *Ulry v. Keith*, 237 Ill., 284, 86 N. E. Rep., 696.
- Barringer and Ames, on Mines and Mining*, pp. 30, 31.

PROPOSITION IX.

The Measure of Damages in Actions at Law.

If the oil and gas in place, like solid minerals, were capable of ownership, and if it were conceded that the leases in question conveyed to the complainants title to the oil and gas *in situ*, the measure of damages, in an action at law for their conversion, would be the value of these substances *in place*, and not the amount for which they were sold, unless the trespass was wilful or malicious.

AUTHORITIES.

- (U. S.) *Bolles Wooden-Ware Co. v. U. S.*, 106 U. S., 433, 27 Law Ed., 230.
- (U. S.) *Colorado etc. Co. v. Truck*, 70 Fed. Rep., 294.
- (U. S.) *Durant Min. Co. v. Percy etc. Co.*, 93 Fed. Rep., 166.
- (U. S.) *Golden Reward Min. Co. v. Buxton etc.*, 97 Fed. Rep., 413.
- (U. S.) *Resurrection etc., Co. v. Fortune etc., Co.*, 129 Fed. Rep., 668.
- (U. S.) *Mon. Min. Co. v. St. L. Min. Co.*, 147 Fed. Rep., 897.
- (U. S.) *United States v. Homestake Min. Co.*, 117 Fed. Rep., 481.
- (Col.) *Montrozona Gold Min. Co. v. Thacher*, 75 Pac. Rep., 595.
- (Col.) *United Coal Co. v. Canon City Coal Co.*, 24 Col., 116.
- (N. Y.) *Dyke v. National Transit Co.*, 22 N. Y. App. Div., 360, 49 N. Y. Supp., 180.
- (Penn.) *Crawford v. Forest Oil Co.*, 57 Atl. Rep., 47.
- (Mass.) *Stockbridge Iron Co. v. Cone Iron Works Co.*, 102 Mass., 80.

PROPOSITION X.*The Rule in Equity.*

Where one having a superior title goes into a court of equity to assert his right to property, even as against a wilful wrongdoer, he is required to do equity by paying for improvements placed upon the property. And if he seek an accounting for rents and profits, he must bear the cost of production.

AUTHORITIES.

- (U. S.) *Williams v. Gibbes*, 20 How., 535.
- (Va.) *Ruffners v. Lewis, Ex'rs.*, 7 Leigh, 720, 30 Am. Dec., 513.
- (Ill.) *Lagger v. Mut. Union Labor Ass'n.*, 146 Ill., 296.
- (Ill.) *Williams v. Vanderbilt*, 145 Ill., 239.
- (Ill.) *Butler v. Butler*, 164 Ill., 171.
- (Ill.) *Eury v. Merrill*, 61 Ill., 193.
- (Ill.) *Gloss v. Clark*, 47 Ill. App., 609.
- (Ill.) *Cable v. Ellis*, 120 Ill., 136.
- (Ill.) *Britt v. Yeaton*, 101 Ill., 242.
- (Ill.) *Bradley v. Snyder*, 14 Ill., 363.
- (W. Va.) *Williamson v. Jones*, 34 W. Va., 563, 38 L. R. A., 694.
- (Tex.) *Chaney v. Colman*, 77 Texas, 100.
- (Pa.) *Crawford v. Forest Oil Co.*, 208 Pa., 5, 57 Atl. Rep., 47.
- (Pa.) *Phillips v. Coast*, 130 Pa., 572.
- Pomeroy's Equity Jurisprudence*, Vol. 3, Sec. 1,241.

PROPOSITION XI.*Interest.*

It was error to charge interest on the respective amounts the defendants were decreed to pay the complainants, from the 10th day of August, 1910.

AUTHORITIES.

- (Ill.) *Revised Statutes of Illinois*, Sec. 2, Chap. 74.
- (Ill.) *Imperial Hotel v. Claffin Co.*, 175 Ill., 124.
- (Ill.) *Florshein v. Ill. Tr. Sav. Bank*, 192 Ill., 382.

- (III.) *Foots v. Ill. Tr. Sav. Bank*, 193 Ill., 680.
 (III.) *Fred Espert v. A. H. Alschlanger*, 117 Ill. App., 484.
 (III.) *Hablet v. Bloomington*, 71 Ill. App., 204.
 (III.) *Gloss v. Clark*, 97 Ill. App., 620.

PROPOSITION XII.

Judicial Comity.

When the nature of "property" in natural gas and oil contained in the earth, and the legal effect of instruments of the character of those here involved have been settled authoritatively by the rulings of the highest court of the State in which they have their *situs*, such decisions establish rules of property peculiar to mining in that State, which the Federal Courts will recognize and follow.

AUTHORITIES.

- (U. S.) *Burgess v. Seligman*, 107 U. S., 20.
 (U. S.) *Elmdorf v. Taylor*, 10 Wheat., 152.
 (U. S.) *Bucher v. Chesire R. Co.*, 125 U. S., 555.
 (U. S.) *Brown v. VanBraam*, 3 Dall., 344.
 (U. S.) *Riddle v. Mandeville*, 1 Cranch, 290.
 (U. S.) *Riddle v. Mandeville*, 5 Cranch, 322.
 (U. S.) *Telfair v. Stead*, 2 Cranch, 407.
 (U. S.) *Batton v. Easton*, 1 Wheat., 476.
 (U. S.) *Powell v. Harmon*, 2 Peters, 214.
 (U. S.) *Green v. Neal*, 6 Peters, 292.
 (U. S.) *Jackson v. Chew*, 12 Wheat., 153.
 (U. S.) *Henderson v. Griffin*, 5 Peters, 151.

(U. S.) *Bank of Hamilton v. Dudley*, 2 Peters, 492.

(U. S.) *Smith v. Kernichan*, 7 Howard, 198.

(U. S.) *Neesmith v. Sheldon*, 7 Howard, 812.

(U. S.) *Golden v. Prince*, 3 Wash., 318.

(U. S.) *Suydam v. Williamson*, 24 Howard, 427
Contra.

(U. S.) *Kuhn v. Fairmount Coal Co.*, 215 U. S., 349.

(U. S.) *Swift v. Tyson*, 16 Peters, 1.

(U. S.) *Lane v. Vick*, 3 Howard, 464.

(U. S.) *Foxcraft v. Mallet*, 4 Howard, 353.

(U. S.) *Rowen v. Runnels*, 5 Howard, 134.

(U. S.) *Williamson v. Berry*, 8 Howard, 495.

(U. S.) *Ohio Oil Co. v. Indiana*, 177 U. S., 583.

(U. S.) *Huggins v. Daley*, 99 Fed. Rep., 606, (C. C. A., Fourth Circuit), 48 L. R. A., 320.

(U. S.) *Foster v. Elk Fork Oil Co.*, 90 Fed. Rep., 178, (C. C. A., Fourth Circuit).

(U. S.) *Federal Oil Co. v. Western Oil Co.*, 121 Fed. Rep., 675, (C. C. A., Seventh Circuit).

PROPOSITION XIII.

Stare Decisis, et non Quieta Movere.

The questions involved in these cases having been firmly settled by a long and uniform line of decisions by the highest court of Illinois, and by the highest Federal court in that jurisdiction, and likewise by the United States Supreme Court, these decisions should forever foreclose further agitation of these questions in that State.

AUTHORITIES.

- (Ill.) *Frisby et al. v. Ballance, et al.*, 5 Ill., 287.
- (Ill.) *Bowman v. Cunningham*, 78 Ill., 48.
- (Ill.) *Weaver v. Weaver*, 109 Ill., 869.
- (Ill.) *Chicago Mun. Gas Light Co. v. Town of Lake*, 130 Ill., 42, 22 N. E. Rep., 616.
- (Ill.) *Lancaster v. Roberts*, 144 Ill., 213, 33 N. E. Rep., 27.
- (Ill.) *Vogle v. Pekoc*, 157 Ill., 339, 42 N. E. Rep., 386.
- (Ill.) *Welty v. Jacobs*, 171 Ill., 624, 49 N. E. Rep., 723, 40 L. R. A., 98.
- (Ill.) *East St. Louis Con. Ry. Co. v. City of E. St. Louis*, 182 Ill., 433, 55 N. E. Rep., 533.
- (Ill.) *Baur v. Lumaghi Coal Co.*, 209 Ill., 316, 70 N. E. Rep., 634.
- (Ill.) *Cleveland v. Martin*, 218 Ill., 73, 75 N. E. Rep., 772.
- (Ill.) *Bruner v. Hicks*, 230 Ill., 536, 82 N. E. Rep., 888.
- (Ill.) *Watford Oil and Gas Co. v. Shipman*, 233 Ill., 9, 84 N. E. Rep., 53.
- (Ill.) *Poe V. Ulry*, 233 Ill., 56, 84 N. E. Rep., 46.
- (Ill.) *Cortelyou v. Barnsdall*, 236 Ill., 138, 86 N. E. Rep., 200.
- (Ill.) *Ulry v. Keith*, 237 Ill., 284, 86 N. E. Rep., 696.
- (U. S.) *Federal Oil Co. v. Western Oil Co.*, 112 Fed. Rep., 373.
- (U. S.) *Federal Oil Co. v. Western Oil Co.*, 121 Fed. Rep., 674.
- (U. S.) *Smith et al. v. Guffey et al.*, 202 Fed. Rep., 106.
- (U. S.) *Ohio Oil Co. v. Indiana*, 177 U. S., 190.

(U. S.) *Rutland Marble Co. v. Ripley*, 10 Wall., 339, 359.

(U. S.) *Southern Express Co. v. The Western etc. Co.*, 99 U. S., 191.

(U. S.) *Kerrick v. Hannaman*, 168 U. S., 328.

Argument

PROPOSITION I.

Pre-Requisites to Recovery.

To warrant the granting of any of the relief sought, the complainants must not only come into court with "clean hands," but it must clearly appear that the contract upon which they base their demand for relief is one which a court of equity will enforce. They must recover, if at all, upon the strength of their own title and upon the merits of their own cause.

At the very threshold of this argument, we wish to emphasize the distinction between an action in equity to enforce a contract, and one to annul a contract. In the former class of cases, the court is asked to give force and effect to the instrument, to place its stamp of approval, not only on the contract itself, but upon the conduct of the party seeking to enforce it, in relation thereto. In the latter class of cases, the court is asked to move in the opposite direction,—to tear down, to destroy what has been created by the hands of others. In the one case, the court is asked to use its judicial power as a protecting shield, in the other, as an invader's sword.

Thus, a court of equity will move with caution in either direction. It will give its sanction to such contracts only as are clearly equitable, and will annul such contracts only as are clearly void. Equity will not aid a derelict, nor enforce a contract wanting in equity.

The plaintiffs below, went into a court of equity seeking equitable relief and invoked the extraordinary power of the court to grant an injunction to restrain an alleged trespass. To warrant such relief, the moving party must

show the existence of a right violated or threatened,—a satisfactory title to the *locus in quo*. A mere volunteer can not secure the aid of equity to prevent a trespass or injury to another.

“An injunction being the ‘strong arm of equity,’ should never be granted except in a clear case of irreparable injury, and with a full conviction on the part of the court of its urgent necessity. * * * Nor will the relief be granted to prevent the commission of acts which, though unauthorized, yet produced *no results injurious to the plaintiff*.”—*High on Injunctions*, Vol. 1, (3rd Ed.) Sec. 22.

“To warrant the interference of equity in restraint of trespass, two conditions must co-exist: *First*, the complainant’s title must be established; *Second*, the injury complained of must be irreparable in its nature.—*High on Injunctions*, Sec. 701.

“To entitle the plaintiff to a final perpetual injunction against the defendant, he must allege in his bill of complaint facts showing his right to the relief prayed for against the defendant. It is not sufficient that the defendant is in the wrong, or is about to commit an injury, if it does not affect the plaintiff. He must show, both by his pleading and proof, the necessity of the interference of the court to protect his rights, and if he fails to do this, he will be defeated. * * * The burden of establishing a right to a perpetual injunction, claimed by a party to an action, is upon such party. *A court will grant a perpetual injunction only when a party shows a clear right thereto*.—*Am. & Eng. Encyc. of Law*, Vol. 10, pp. 784-5.

“The existence of a right violated is a prerequisite to the granting of an injunction. Where it

is shown that the complainant does not have the right he claims; he is not entitled to an injunction, either temporary or perpetual, to prevent a violation of such supposed right. So where the complainant claims his right under a law that is unconstitutional, or under a contract that is illegal, he is not entitled to an injunction."—*Cyc. of Law and Procedure*, Vol. 22, page 749.

Not only so but the courts have announced even a broader rule. Not only must the contract upon which the complainant bases his demand for relief be *legal*, but it must also be *equitable*. In the case of *Federal Oil Co. v. Western Oil Co.*, 112 Fed. Rep., 373, on page 375, Judge Baker very clearly states the condition upon which relief, in such cases will be granted, thus:

"An agreement may be enforceable at law, and there may be no sufficient grounds for its cancellation in equity; and yet, upon a just and fair consideration of the attendant and collateral circumstances, the court may be satisfied that the contract is unconscionable, and refuse to decree its performance. Before granting a decree, the court must be satisfied, not only of the existence of a valid contract, free from fraud and enforceable at law, but also of its fairness and of its harmony with equity and good conscience; and any fact showing the contract is unfair, unjust, and against good conscience will justify the court in refusing to decree its performance."

The above case was taken to the U. S. Circuit Court of Appeals for the Seventh Circuit, and in rendering its decision in that case the court, by Judge Jenkins, stated the rule governing actions of this kind in these words:

"The contract must possess certain elements, to demand of equity the exercise of its jurisdiction to

enforce performance. It must be upon a valuable consideration. It must be mutual in its obligations and in its remedy. It must be perfectly fair, equal, and just in its terms and in its circumstances, and the situation must be such that the remedy of specific performance will not be harsh or oppressive. The contract must be such that the court is able to make an efficient decree for its specific performance and to enforce the decree when made."—*Federal Oil Co. v. Western Oil Co.*, 121 Fed. Rep., 674, 676.

And in the case of *Rust v. Conrad*, 47 Mich., 449, 41 Am. Rep., 720, the rule is stated by that eminent scholar, author and jurist, Thomas M. Cooley, thus:

"When a party comes into equity it should be very plain that his claim is an equitable one. If the contract is unequal; if he has bought land at a price which is highly inadequate; if he has obtained the assent of the other party to unreasonable provisions, if there be any indication of overreaching or unfairness on his part, the court will refuse to entertain his case, and turn him over to the usual remedies."

In the case of *Michigan Pipe Co. v. Fremont etc. Co.*, 111 Fed. Rep., 284, the United States Circuit Court of Appeals for the Eighth Circuit, by Judge Sanborn, C. J., most admirably states the conditions upon which equitable relief will be granted, in these luminous words:

"A suit in equity is an appeal for relief to the moral sense of the chancellor. A court of equity is the forum of conscience. Nothing but good faith, the obligations of duty, and reasonable diligence will move it to action. Its decree is the exercise of discretion,—not of an arbitrary and fickle will, but of a wise, judicial discretion, controlled and guided by the established rules and principles of equity juris-

prudence. One of the most salutary of these principles is expressed by the maxims 'He who comes into a court of equity must come with clean hands,' and, 'He who has done inequity, cannot have equity.' A court of equity will leave to his remedy at law—will refuse to interfere to grant relief to—one who, in the matter or transaction concerning which he seeks its aid, has been wanting in good faith, honesty or righteous dealing. While in a proper case, it sets upon the conscience of the defendant, to compel him to do that which is just and right, it repels from its precincts remediless the complainant who has been guilty of bad faith, fraud, or an unconscionable act in the transaction which forms the basis of his suit. 1 *Pom. Eq. Jur. Secs.* 397, 398, 400; *Medicine Co. v. Wood*, 108 U. S., 218, 227, 2 Sup. Ct. Rep., 436, 27 L. Ed., 706; *Marble Co. v. Ripley*, 10 Wall., (U. S.), 339, 357, 19 L. Ed., 955."

If there is reason for the application of the above rules to cases involving contracts generally, there is greater reason for the strict application of even more stringent rules to cases involving "oil contracts," as we shall presently see.

PROPOSITION II.

Oil Leases,—How Construed.

Because of the peculiar character of oil and gas as "property," and the violent fluctuations in the value of lands and leaseholds incident to the discovery of these substances, the courts have placed contracts of this kind in a class by themselves, and in the light of the known character of the business of "oil mining," construe them most strictly against the lessee and favorable to the lessor.

Leases for oil and gas purposes occupy a place in modern jurisprudence distinct and apart from precedents established in relation to contracts generally. This is true, in a measure, because of the peculiar nature of these substances. Their origin, their characteristics, the manner of obtaining them, the uses to which they may be put and the manner in which they must be handled in applying them to these uses, all go to place them in a class by themselves, and new rules have been created and applied to the necessities and conditions which have grown out of the great and important industries incident to their use and ownership.

Principles established in relation to mining contracts, generally, do not apply for the reason that stable minerals having a fixed *situs* such as coal, iron and the precious ores, are a part of the land and belong to the owner thereof and may be owned or alienated separate from the soil. They remain in place until removed by some external agency, and when removed, are not replaced by natural causes from unknown sources.

Not so with oil and gas. Because of the volatile character of these substances and their consequent vagrant and migratory habit, they are incapable of ownership in their natural state and have been classed as minerals *ferae naturae*. And because of their elusive tendency, lands, which, if operated at an opportune time would prove an Eldorado to the owner, may become sapped, depleted and worthless to him through the laches of the lease holder who, through design or otherwise, would take, or suffer to be taken, these valuable fluid-minerals through wells on adjacent lands, and thus deprive the land owner of that which should be his.

Not only so, but the immense profits obtained from the discovery of oil and gas, and the violent fluctuations in the value of this class of property incident to their dis-

covery, are conducive to speculative schemes and questionable methods resorted to by a certain element engaged in the business, not only for the purpose of gaining an undue advantage in obtaining leases and in conducting the business, but in an endeavor to outwit the courts and to evade, by cunningly devised subterfuges, many of the decisions which have been rendered. These are matters of common knowledge of which the courts take judicial notice and in many instances have caused the courts to become outspoken and to lay hold of refractory litigants with a strong and resolute hand, as will be seen in the cases cited in the brief preceding this argument.

Indicative of the vigor with which many of the courts have spoken, is the following language of Judge Brawley of the Circuit Court of Appeals of the Fourth Circuit, in the case of *Huggins v. Daley*, 99 Fed. Rep., 606:

"The proof is clear that he never intended to drill a well within the time stipulated. The proviso was written by the lessee evidently for the purpose of deception. He knew the object of the lessor was to secure diligent search for oil, and he was 'keeping the word of promise to the ear and breaking it to hope,' skillfully turning it into a mere speculative lease, binding the lessor and leaving himself free. 'Law, as a science, would be unworthy of the name, if it did not to some extent, provide the means of preventing the mischiefs of improvidence, rashness, blind confidence and credulity, on the one side, and of skill, avarice, cunning and a gross violation of the principles of morals and conscience on the other.' "

In speaking of the rules employed in construing oil and gas leases, Bryan, in his work on "*Petroleum and Natural Gas*," p. 146, says:

"As will be seen from an examination presently

to be made, the trend of decisions touching questions of forfeiture arising out of oil and gas leases, has been almost uniformly in favor of the lessor. Generally it is the lessee who is favored, and after a substantial compliance by him with the terms of the contract, equity will not regard a technical breach. But, with mining leases, it is otherwise. This is due, principally, if not entirely, to the nature of the business of mining, and more especially, oil mining; to the temptation offered the shrewd operator to purchase at a nominal price the right of developing the lands, the owner of which is ignorant of their value for any purpose, and then to hold them indefinitely, should it suit his purpose, neither working them himself, nor permitting another to do so.

"Of course, it may be said in a general way, that parties may make any contract which they desire, and if the lessor should, by way of lease, make his intention clear to grant the oil and gas right upon his property for an inadequate consideration, the courts will enforce it. But the lessee, where the instrument presents a semblance of inequality or unfairness, will find that he has a thorny road to travel before reaching a judicial establishment of his claims."

In Thornton on "*The Law Relating to Oil and Gas*," p. 98, the rule is stated that "such leases are construed most strictly against the lessee and favorable to the lessor," citing many authorities.

In the case of *Parish Fork Oil Co. v. Bridgewater Gas Company*, 51 W. Va., 583, 59 L. R. A., 566, the rule is stated that "an oil lease will be so construed as to promote development and prevent delay and unproductiveness."

In a very well considered opinion in the case of *Kolachny v. Galbreath*, 26 Okl., 772, 110 Pac., 902, the rule is stated that: "When contracts are optional in respect to one party, they are strictly construed in favor of the party that is bound and against the party that is not bound."

And in the case of *Frank Oil Co. v. Belleview Gas & Oil Co.*, 119 Pac., 260, the same court states the rule that: "A different rule of construction obtains as to oil and gas leases from that applied to ordinary leases or to other mining leases. Owing to the peculiar nature of the mineral, and the danger of loss to the owner from drainage by surrounding wells, such leases are construed most strongly against the lessee and in favor of the lessor."

In the case of *Federal Oil Co. v. Western Oil Co.*, 112 Fed. Rep., 373, and in many other cases, is found the statement that "oil leases stand on quite different grounds from leases of other property," and running through all the cases having to do with this class of property will be found the doctrine that contracts of the character of these here involved, are in a class by themselves and governed by rules peculiarly applicable to the business of "oil mining." These rules have been fashioned in the forge of experience in the light of public and private necessity.

Evolution of the "Oil Lease."

While "petroleum," under various names, has been known for more than twenty centuries, and has been put to many uses, both ancient and modern, the "oil lease" which we have today is of recent origin. The first lease of land for oil purposes bore date of January 16, 1855. It covered a part of a small island at the junction of Pine and Oil Creeks in Cherrytree Township, Venango County, near Titusville, Pennsylvania. It was given to the Penn-

sylvania Rock Oil Company, the first oil company incorporated in America. It was for a term of ninety-nine years, and the consideration paid for it was five thousand dollars. Out of this transaction came the famous Drake well in which oil was "struck" on August 28, 1859, at a depth of sixty-nine and one-half feet.

The excitement incident to this discovery was intense. At first, under various names, petroleum was sold as a medicine at exorbitant prices. Later, in 1861, when its uses became more diversified, it sold in the oil region for twenty dollars a barrel. These prices were a potent incentive to development and gave impetus to the frantic effort to obtain the oil rights upon prospective territory. At first these rights were purchased outright at a fixed price—the royalty plan of leasing came later.

These early leases were obtained for the purpose of development with a view to obtaining rich returns from production. As a consequence, even under the crude methods then employed, development was rapid and the increase of production was so great that in November, 1861, oil brought but five cents a barrel at the well, the lowest for which it ever sold. This, however, was due largely to the limited uses to which it was then put and the lack of facilities for transporting it. After better methods of transportation were devised, the price increased, and in 1864, it sold for fourteen dollars a barrel. (See "*Braunt on Petroleum*," "*Henry's History of Petroleum*," "*American Journal of Science*," July, 1883, "*Crew on Petroleum*," 142.)

With the marvelous increase of the business, the spirit of speculation became rife. Men of great ability and shrewdness were attracted by the fabulous fortunes to be garnered in so short a time from this new field of enterprise, and soon there appeared upon the scene what is known in oil parlance as the "scalper"—one who acquires

the oil rights upon prospective territory at a nominal cost, not for the purpose of operating, but to speculate upon the result of future development in the vicinity by others.

To this end, there was invented a form of lease containing what is known as the "unless clause." If that clause, as originally employed, were used in this lease, it would be worded thus: "In case no well is completed on said premises within nine months from this date, then this grant shall become null and void *unless* the second party shall thereafter pay the first party twenty-five cents quarterly in advance, for each year thereafter such completion is delayed."

It will be observed that in this form of lease there is no promise to either complete a well or to pay, and under it, the lessee sought to hold the premises so long as he paid this "rental," and upon failure to pay, the lease terminated automatically, without a formal surrender. This was the pioneer "scalper's lease" and was extensively used in the oil regions of Pennsylvania and West Virginia in the early history of the oil business, and to this day is used in new fields where the land owners have not become acquainted with the "tricks of the trade." Under this form of lease, thousands of acres in the oil and gas regions have been tied up and held dormant awaiting development in the vicinity by others, for the purpose of speculation. If such development should show the premises to be valuable for oil and gas purposes, these leases would then be sold for an exorbitant price to legitimate operators. Thus the enhanced value of the premises incident to the discovery of oil in the vicinity is intercepted by the speculator at the expense of the land owner, and at but little cost to him.

But the courts were appealed to for relief and they held these leases void for want of mutuality, adopting the familiar rule, which has become a maxim in "oil law,"

that "contracts, unperformed, optional as to one of the parties, are optional as to both."

To evade this rule, the resourceful speculator adopted a modified form in which was inserted a promise to pay a certain stipulated sum until a well should be "commenced." Under this form, it would be claimed that a well was "commenced" by merely driving a stake, or by placing some idle drilling machinery or an abandoned derrick, or the like, upon the premises, or by actually penetrating the earth a few feet and then suspending further work. This lease also went down before the courts when they held that, "if the lease fails to bind the lessee to diligent search for oil and gas, it is without consideration, binding on neither party, and voidable at the pleasure of either."

But the speculator is not yet dismayed. To evade this rule, the form was changed and there was placed in the lease a promise "to complete a well" within a certain time, or thereafter pay a stipulated sum until a well should be "completed." Under this form, a well would be said to be completed after a most indifferent effort, or, if in fact completed, it would be "shut in" and the premises held dormant for speculating purposes. But this lease also went down under the rule announced in *Steel-smith v. Gartlan*, *supra*, and emphasized in a multitude of cases, notably, *Foster v. Elk Fork Oil Co.*, *supra*, *Hug-gins v. Daley*, *supra*, *Parish Fork Oil Co. v. Bridgewater Gas Co.*, *supra*, *Gadbury v. Ohio etc. Co.*, *supra*, and many others,—that while "the completion of a well saves the penalty, it does not amount to a fulfillment of the covenants;" that "the discovery and production of oil and gas is a condition precedent to the continuance or vesting of any estate in the demised premises."

In this race between the speculator and the courts, the form of lease in these cases was evolved, which is the

very acme of inventive genius. It contains in veiled form, all of the vices of its predecessors and one more,—the right to surrender at any time. While it is profuse in its apparent promises to produce, the lessee, in fact, is not bound to do anything, but promises to pay a nominal sum until a well is completed, thus supplying a colorable consideration for the grant, but which may be evaded under the "surrender clause." This form went the way of its predecessors under the rule that "*A court of equity never interferes where the power of revocation exists.*"

Thus it will be seen from an examination of the decided cases in oil litigation, that two kinds of subterfuges have been employed by the "scalper" by which he has sought to obtain a lease whereby he may bind the owner of the land awaiting development in the vicinity, and thus be enabled to intercept the enhancement in the value of the leasehold, in case oil should be found, and at the same time be free to abandon the enterprise without liability, in the event that the premises should be found to be "dry." In the one form of lease, this was accomplished by the "unless clause," in the other form, the same thing was accomplished by the "surrender clause."

As between the two, the lease containing the "unless clause" is the more equitable. Under it, if the lessee fail to pay or develop, the lease automatically terminates and ceases to be a cloud on the lessor's title. Under it, the holder thereof can not stand idly by and neither pay nor develop, as was true in these cases, and see the premises developed at the labor, risk and expense of another, and then decide, when all danger is past, as to whether he will assert his claim or surrender it. Under one form, in case no work be done, the lease becomes void, *unless* the lessee pay; under the other, in case no work be done, the lessee must pay *unless* he elect to avoid it. In one it is optional

with the lessee as to whether he will pay or allow the lease to lapse of its own terms; in the other it is optional with the lessee as to whether he will pay or surrender the lease. While in form, there may be a distinction between these leases, in effect there is none; and the courts, looking to substance rather than to form, have persistently and consistently refused to enforce either, holding both to be "*nudum pactum ex quo non oritur actio*"—a naked promise from which no action arises.

PROPOSITION III.

The Contracts Are Inequitable.

The contracts upon which the complainants base these actions should not be enforced in a court of equity because they are deceptive, unjust, unequal, unfair and inequitable; while they purport to be "for the sole and only purpose of mining and operating for oil and gas," they contain no provision requiring this "purpose" to be accomplished, but permit the complainants to hold the premises dormant for the purpose of speculation, and thus defeat the very purpose for which they were given.

In construing contracts, the courts will look, not only to the language of the instrument, but to the situation of the parties, the purposes inspiring it and the objects to be attained. They will endeavor to view the whole transaction in the light in which the parties viewed it in order to get the probable meaning of the words employed. As commonly expressed, they will view the contract from its "four corners" in order to get the intent and purpose of the parties.

In speaking on this subject, Mr. Justice Clifford, in the case of *Nash v. Towne*, 72 U. S., 698, said:

"Courts, in the construction of contracts, look

to the language employed, the subject-matter and the surrounding circumstances. They are never shut out from the same light which the parties enjoyed when the contract was executed, and in that view, they are entitled to place themselves in the same situation as the parties who made the contract, so as to view the circumstances as they viewed them, and so to judge of the meaning of the words and of the correct application of the language to the things described."

Let us, then, in so far as it is possible to do so, place ourselves in the situation of the parties to the contracts here in controversy, that we may be better enabled to determine their respective rights.

Here is a woman, Susannah Smith, who is the owner of a small tract of land, containing thirty acres, in Crawford County, Illinois, and her son, James A. Smith, who owns a twenty acre tract adjacent thereto, which is prospectively oil producing. Oil had been discovered in the county just north of them, and they are anxious to avail themselves of this bountiful gift of Nature by having their lands developed, that they may receive their share of this rich heritage. They have neither the knowledge nor the means to develop their lands. They are not in the oil business. Their business is farming. They know no other.

Along comes M. A. Walton, a stranger and resident of West Virginia. He is not a producer, but is what is known among oil men as a "scalper"—one engaged in obtaining leases, not for the purpose of operating, but to speculate upon. He is a professional leaser, schooled in the art of obtaining "marketable" leases. His experience in this line extends over many years and in many fields, as shown by his own testimony in these cases. He knows the rapid fluctuation in the value of this kind of prop-

erty; knows that sudden wealth comes to him who holds the oil rights on lands in the region where oil is found. He is provided with blank leases previously prepared with great care to suit his purpose.

These people engage in negotiating a lease on these tracts of land. The land owner is anxious to have the premises developed at an early date in order to obtain the royalty that will come only from production. To this end there is placed in the lease a clause apparently securing an initial well within nine months. The second party covenants and agrees: "1st, to deliver to the credit of the first party, free of cost, the equal one-eighth part of all oil produced and saved from the leased premises; and, 2nd, to pay \$100 per year for the gas from *each and every* gas well drilled on said premises, the product of which is marketed and used off the premises, said payment to be made on *each well* within sixty days after commencing to use the gas therefrom."

The second party also "covenants and agrees to locate *all wells* so as to interfere as little as possible with the cultivated portion of the farm. And, further, *to complete a well on said premises within nine months from the date hereof*, or pay at the rate of 25 cents per year, quarterly in advance, for each additional three months such completion is delayed."

Provision is also made for "laying of pipe lines and building tanks, stations and structures to take care of said products" and for "the privilege of using sufficient water from said premises to run all necessary machinery for drilling and operating thereon." The only portion of said premises exempt from such operation is a radius of "200 feet around the buildings on which no well shall be drilled by either party except by mutual consent."

To the average mind not accustomed to analyzing contracts,—especially oil contracts,—it would seem that

these people have a lease securing the early development of the premises for oil and gas purposes. On the surface, the language of these instruments contemplates active operation, and if found, the production of oil and gas, and the payment of the rents and royalties resulting therefrom. They are ostensibly given "*for the sole and only purpose of mining and operating for oil and gas.*" This is the purpose recited in the instruments. Not only do they look to the completion of *one* well within nine months, but frequent reference is made to "*each and every well*" and to "*all wells*,"—holding out the inference that there are to be many wells upon the premises.

These leases were executed on the 22nd day of May, 1905, and were immediately taken away by the "second party." They were not even recorded by him on the public records of the county.

The land-owners are hopeful that soon they will begin to enjoy some benefit from the rich treasures which underlie the premises and which await only the action of the lease-holder in carrying out the purpose of the leases as mutually understood by the parties. Much more than the nine months' probationary period goes by and their hopes are not realized. Development in the vicinity shows the premises to be in a rich oil pool. The land on every side is under lease and is being developed and operated and handsome returns from royalties are being realized by the owners, but these lands remain dormant. No word has come from the holder of the leases, and to all appearances they have been abandoned. Even the stipulated penalty for delay has been neither paid nor deposited.

Analyzing the language of these instruments, it is found that, instead of securing development of the premises and the production of oil therefrom,—the very thing which inspired their execution,—they are so worded as to defeat this purpose. They contain no promise or agree-

ment to do any of the things contemplated, but permit the lessee to hold the premises dormant for the purpose of speculating upon the enhancement of the value of the leaseholds, incident to the discovery of oil in the vicinity.

There is an apparent promise "to deliver to the credit of the first party, free of cost, the equal one-eighth part of all oil produced and saved from the leased premises," but there is no promise to ever "*produce*," or "*save*" any oil. So, too, is there an apparent promise "to pay \$100 a year for the gas from each and every gas well drilled on the premises, the product of which is marketed and used off the premises," but there is no promise to ever "*produce*" or "*market*" or "*use*" any gas. There is no promise to ever complete a well of any kind on the premises. If none is ever completed, what would be the remedy? Would an action lie for specific performance? Performance of what? There is no promise to perform anything. In an action for damages, the amount of recovery would be limited to the 25 cents a year mentioned in the instruments, and even the liability for this pittance may be avoided under the surrender clause!

What, then, is the character, purpose and legal *status* of these instruments which are called, or, rather, mis-called, leases and upon which the petitioners base these actions?

Their purpose is obvious. It is a matter of common knowledge that oil property is the most fluctuating in value of anything known as property. The exclusive right to operate upon prospective oil territory may, within a short time, prove immensely valuable. By these instruments, if enforceable, the lessee secured to himself, for the mere sum of one dollar, the prospective enhancement in the value of these premises for a period of nine months, and by the payment of 25 cents a year, could hold the

premises dormant for a period of five years, awaiting development in the vicinity, securing to himself the advantages to be gained thereby with but little cost to him. Not only so, but if at any time he should so desire, he may avail himself of the surrender clause and be relieved from all obligation unfulfilled. Thus, it will be seen, that while the second party seeks to bind the owner of the land for a period of five years, whereby he stands to reap the enhanced value of the premises incident to the discovery of oil and gas in the vicinity, he remains free to develop or not develop, to hold on or to abandon the premises at his own pleasure, without risk or liability on his part.

And, moreover, not only is it within the power of the lessee to deprive the lessors of all income from royalties, because they are without power to compel the doing of the things contemplated by the leases, but they are also deprived of the right to operate upon their own premises, or to procure others to do so, for a period of five years. And these rights for which they received the paltry sum of but one dollar, with the clear understanding that they were to be rewarded in royalties to come only from production, can, in the meantime, be easily sold for Fifty Thousand Dollars. This handsome fortune which was theirs, was intercepted by another under a lease so cunningly worded and designed as to enable him to do so within its letter, but in violation of its spirit and express purpose. Thus, while he is "keeping the word of promise to the ear, he is breaking it to the hope, skillfully turning it into a mere speculative lease, binding the lessor, but leaving himself free."

And these are the leases that a court of equity,—a court of conscience,—is asked to enforce, and this is the transaction to which the court is asked to become an accessory!

PROPOSITION IV.*Want of Consideration and Mutuality.*

The leases owned by the complainants, and upon which they base these actions, are not enforceable in a court of equity (a) for want of Consideration, (b) for want of Mutuality of Engagement and (c) for want of Mutuality of Remedy.

(a) WANT OF CONSIDERATION.

The consideration for the execution of the leases in question was not the recited \$1.00, nor the 25 cents a year mentioned, but the real consideration was the development of the premises for, and if found, the production of oil and gas, and the rents and royalties resulting therefrom and dependent thereon. "If the lease fails to bind the lessee to diligent search for oil and gas, it is without consideration, binding upon neither party, and voidable at the pleasure of either."

It can not with any show of reason be contended that for the sum of one dollar each, Susannah Smith and James A. Smith executed the leases in question thereby depriving themselves of the prospective benefits which they would receive from the discovery of oil and gas in that vicinity for a period of nine months, and for the sum of 25 cents a year, or 25 cents an acre, for a term of five years. To so contend would be to argue very conclusively that they were not capable of managing their own affairs. None but a *non compos mentis* would so encumber his property and part with rights so valuable for such a pittance. As was said by Judge Baker in the case of *Federal Oil Co. v. Western Oil Co.*, 112 Fed Rep., 373: "If there was no other consideration which the lessee was bound to yield to the lessor, a court of equity would be bound to refuse the enforcement of the lease.

The consideration would be so trifling, compared with the leasehold interest, as to shock the moral sense."

What, then, was the consideration which induced the execution of these instruments? What was the moving cause which inspired the granting of these valuable rights and privileges? The instruments themselves recite that they were given "*for the sole and only purpose of mining and operating for oil and gas.*" If these money payments were the consideration, why this recital in the lease? These payments are made only in case of failure to "mine and operate," and cease when a well has been completed. Clearly it was the development for and, if found, the production of oil and gas, and the consequent rents and royalties dependent thereon which constituted the consideration for the execution of these instruments.

Do these instruments give to the lessors that consideration? Is there a single promise or covenant requiring the development of the premises or the production of oil or gas,—the accomplishment of the sole and express purpose for which they were given? As has been seen, these instruments do not contain a single promise, covenant or agreement that may not be defeated by the mere will, choice or election of lessee. Where, then, is the consideration to support these contracts? Indeed, do these instruments amount to a contract? Do they not lack at least two essential elements of a contract,—*Consideration and Mutuality?*

In considering these cases let it be kept in mind that no possession was taken of the premises by these petitioners, no money was expended or labor performed by them pursuant to the terms of the leases and, therefore, they have acquired no vested estate in the premises to claim equitable cognizance. If they had taken possession and made development resulting in the finding of oil or gas, then a different question would be presented.

The consideration would be supplied by performance and, in such case, performance is as good as a promise to perform. But in these cases, there was neither performance nor a promise to perform, nor yet an offer to perform, hence, no vested rights and no consideration. But the courts have spoken upon this subject more wisely than we are able to do. We will, therefore, let them argue this case for us.

In the case of *Huggins v. Daley*, 99 Fed. Rep., 606, the United States Circuit Court of Appeals for the Fourth Circuit, in a case in most respects identical with the cases at bar, on this point, used this language:

"The consideration for this lease was the prospective rents and royalties the lessor would enjoy if the lessee, by diligent search, could find oil and gas in paying quantities. *If the lease failed to bind the lessee to diligent search for oil and gas, it was without consideration, binding on neither party, and voidable at the pleasure of either.*"

And quoting from the case of *Oil Co. v. Fretts*, 152 Pa., 451, the court uses this language:

"He could not be compelled to put down another well, and he not being bound, the lessor was not bound either; for the only consideration left him was the prospective oil royalties and gas rentals which the lessee was in a position to entirely defeat. *Contracts, unperformed, optional as to one of the parties, are optional as to both.*"

And again the same court speaking on the subject says:

"The only consideration which moved the lessor to grant the lease was the prospective royalties from oil and gas, which could come only if the lessee complied with the terms of this provision that required

the boring of a well; for, while the sum of one dollar is technically a valuable, it is only a nominal consideration. If the contention of plaintiffs is correct, the lessee, Hodges, or his assigns, could have waited the full term of five years without expending one dollar or moving a hand for the development of the leased property, meantime, tying the hands of the owner of the land, forbidding him to make arrangements with any other person for the exploration which the lessee undertook to make, and perhaps suffering irreparable injury from the drainage of his oil or gas. *This is the contract which a court of equity is asked to enforce. It is a short view of the range of equitable principles.*"

In concluding the opinion, the court says:

"We are of the opinion upon the whole case, that the exploration for, and the development of, oil and gas was the sole consideration for this lease; that the provision requiring the boring of a well within ninety days was a condition precedent to the vesting of any interest to the lessee, and that the forfeiture of \$50.00, was intended merely as a penalty to secure the drilling of a well, and, if paid, would have been merely compensation to the land owner for the right of the lessee to possession during the ninety days, and such payment would not be so far a compliance with the conditions of the lease as to vest in the lessee a title in the leased premises for a period of 5 years; that after the expiration of ninety days from the date of the lease, *there being no provision therein for work to be done by the lessee in the development of the property, which is the sole consideration therefor, the lessor had the option to avoid it.*"

Directly in point also is the case of *Steelsmith v. Gart-*

lan, 45 W. Va., 27, 44 L. R. A., 107, in which the Supreme Court of West Virginia used this language:

"Mrs. McGregor entered into the lease for the sole consideration of the prospective rents and royalties she would enjoy if the lessee, by diligent search therefor, should find gas and oil in paying quantities. *If such lease fails to bind the lessee for diligent search for oil and gas, it was without consideration, binding on neither party, and voidable, if not void, at the pleasure of either.*"

In the case of *Foster v. Elk Fork Oil and Gas Co.*, 90 Fed. Rep., 178, the United States Circuit Court of Appeals, Fourth Circuit, upon the subject now under consideration, used this language:

"The consideration for this lease is the covenants; and these covenants, as has been seen contemplate active operations on the demised premises, the lessor looking for his reward to the result of these operations and dependent upon them. The clause last quoted fixed the time within which active operations must be commenced, and sets forth the penalty for failure so to begin. If the well has been begun and completed within the year no money whatever is paid. If not completed then the money payment ceases when a well has been completed. If no well is dug at all, money is paid, not in consideration for the demise, *but as penalty for not digging the well*. Note the language, 'One well.' The digging of one well is the guaranty that the operations,—the consideration for the demise,—has begun. The agreement to dig one well within one year secures the prompt beginning of the operations. The completion of the well saves the penalty. It does not amount to a fulfillment of the covenants.

"The consideration, therefore, for this lease was the prospective rents and royalties the lessor would enjoy if the lessee, by diligent search, could find oil and gas in paying quantities. 'If the lease failed to bind the lessee to diligent search for oil and gas, it was without consideration, binding on neither party, and voidable at the pleasure of either.'—*Cowen v. Iron Co.*, 83 W. Va., 547, 3 S. E. Rep., 120; *Petroleum Co. v. Coal, Coke and M. Co.*, 89 Tenn., 381, 18 S. W. Rep., 65; *Ray v. Gas Co.*, 139 Pa., 576, 20 Atl. Rep., 1065.

In the case of *Natural Oil and Pipe Line Co. v. Teel*, 67 S. W. Rep., 545, the Court of Civil Appeals of Texas had under consideration the same question which we are now considering, and that court, like every other court that has given an expression upon the subject, held that the real consideration for the demise was the development of the premises for, and the production of, oil and gas. In the opinion the court used this language:

"The real consideration for these instruments was not the recited \$1.00 nor the \$100.00 that after two years might be paid in order to keep it going from year to year, but the beginning and prosecuting, with due diligence, of wells for oil or minerals upon the land; in other words, the development of the property for oil and minerals in the near future. This was the clear purpose of the grant. According to the terms of the contracts, it is left optional when this consideration is to be performed, if ever. They admit of the consideration being withheld absolutely and for all time, without any power on the part of the grantor to insist on performance. In other words, it is left with the vendee and his assigns to abstain from beginning operation and to keep the

land from being developed by the vendor or any one else, as long as they see fit, and thereby to withhold altogether the real consideration upon which the contracts were based. The appellees, of course, could have made a gift of these rights, but it is evident that no gift was intended.

"We think an instrument is not a sale which gives the grantee the right or power to withhold the consideration. The absolute control the contracts gave him in respect to performance of the conditions subsequent, and the absence of any right in the vendor to insist on performance, render the same objectionable for want of mutuality. The work was not begun, hence no equities exist in favor of the appellants. They were not bound to perform, and could abandon the matter at any time. *Under these circumstances, the appellees were also not bound, and they have the right to annul the contract.*"

Applicable also to this contention is the case of *Federal Oil Co. v. Western Oil Co.*, 112 Fed. Rep., 373, in which Judge Baker, on page 375, used this language:

"The only consideration yielded at the time of the making of the lease was \$1.00 in hand paid by the complainant to the lessor. As will be seen later, there was no binding promissory consideration on the part of the complainant for the execution of the lease. The bill, which is verified, alleges that the lease-hold interest claimed to have been acquired exceeds \$2,000.00 in value. The cash payment, if actually made, was merely nominal, and it is quite apparent from a consideration of the terms of the whole lease, that the lessors would not have executed it for such a paltry consideration. If there was no further consideration which the lessee was bound to

yield to the lessors, a court of equity would be bound to refuse the enforcement of the lease. *The consideration would be so trifling, compared with the value of the leasehold interest, as to shock the moral sense.*"

The above case was appealed to the U. S. Circuit Court of Appeals of the Seventh Circuit where it was affirmed, the opinion by Judges Jenkins and Grosscup being reported in 121 Fed. Rep., 674, and is the decision upon which the same court based its decision in these cases.

In the case of *Gadbury v. Ohio etc. Co.*, 162 Ind., 9, 67 N. E. Rep., 259, 62 L. R. A., 895, in a searching and well considered opinion, the Supreme Court of Indiana, reversing the Appellate Court of that state, very fully analyzed a lease of the character of those in this case, and among other things says:

"In determining whether a condition is to be implied, it is important to note that the substantial consideration which moves the grantor to execute such a grant is the hope of profits or royalties if oil or gas is discovered. Even if the grantee in this case had paid the stated consideration of \$1.00—a technically valuable consideration—yet we must construe the instrument with the fact in view that a more substantial reason prompted the making of the grant.

• • •

"The duty to develop the property upon the discovery of oil or gas in paying quantities, is not to be regarded as a mere implied covenant, but, in a case like this, *where practically the whole consideration must depend upon the implied undertaking, it is to be treated as a condition subsequent.*"

It will be observed that in the foregoing cases, and a multitude of others which we have cited, the courts have

gone much farther than is necessary to do in deciding these cases. In those cases, the leases were held to be absolutely void, in actions brought to cancel them, while in these cases, it is not necessary to pass upon the validity of the leases involved, the question being only as to their enforceability in a court of equity at the instance of the lessee.

It will also be noted that in many of the cases cited, there had been at least a part performance; possession had been taken and money expended by way of development resulting, in most cases, in the finding of oil and gas. The infirmity in such instances was due to the want of an obligation assumed by the lessee to operate the premises whereby the lessor would be made secure in receiving his rents and royalties dependent upon production, while in the cases at bar, there is not only *no promise to perform*, but there has neither been performance nor an offer to perform. And since these leases "*fail to bind the lessee to diligent search for oil and gas they are without consideration, binding on neither party, and voidable at the pleasure of either.*"

In the Circuit Court of Appeals, counsel for the appellees took occasion to note that we had argued these cases as if the penalty for delay was twenty-five cents a year, and contended that it was intended to be that much per acre per year, and that the former amount was written into the leases by mistake.

From a legal or equitable point of view, this is a matter of no consequence. In no event can it be said that this was the consideration for which the leases were given.

In the interest of accuracy, however, we might call attention to the fact, as shown by the evidence, that one of these leases was written by M. A. Walton and the

other by one T. E. Pierce. Each also wrote a copy which was left with the lessors. Thus four instruments were written by two different persons, and that in all of them there should appear the same *error*, is hardly within the range of probability. It was no doubt intentionally so written, no matter what the understanding of the parties may have been in this relation, and that the discrepancy was not noticed by either of the lessors, simply shows that it was a mere formal matter of no consequence. It was not, as counsel would have it appear, the subject-matter of the contract, but was a mere incident. The *gravamen* of the contract was the leasing of the land "*for the sole and only purpose of mining and operating for oil and gas,*" and not for twenty-five cents a year, nor for twenty-five cents an acre. If these money payments were the thing bargained for, it is strange, indeed, if this "error" in relation to the subject-matter of the negotiations would not be noticed in at least one of the four papers which were written, by at least one of the four persons who were interested in the transaction!

This leads to another branch of this proposition:

(b) *MUTUALITY OF ENGAGEMENT.*

"Contracts, unperformed, optional as to one of the parties, are optional as to both."

The above words are not our own. They are the words of many courts,—both State and Federal,—employed in stating a well established rule of law.

It is elementary that mutuality of engagement is essential, not only to the *enforceability* of a contract, but also to its *validity*. A promise may be a sufficient consideration for a promise, if the act or forbearance promised is such as to constitute a consideration. The promises must be concurrent. Either promise may be contingent or conditional, except that mutuality of engage-

ment is necessary, and, if the condition or contingency produces want of mutuality, the consideration is insufficient. "*Both parties must be bound, or neither is bound.*"

—*Clark on Contracts*, page 165.

It might be added that the promise of one party is a sufficient consideration for the present delivery of a thing of value, or the present granting of a valuable right or privilege to the other party. But where a promise is the consideration of a contract, that promise must be such as is capable of enforcement by the one to whom it is made. A promise to do an impossible thing, or to do an unlawful thing, or to do a thing which the party making the promise is already bound to do, or a promise to do a thing, which, under the terms of the contract, the party making the promise may avoid doing by surrender or otherwise, is *nudum pactum*, and will not support a contract. In other words, where a promise is the consideration of a contract, it must be within the power of the party in whose favor the promise is made, to compel the performance of that promise; and if not, the contract is void for want of consideration and for want of mutuality.

These principles are universal and have often been applied to oil and gas leases as well as to other classes of contracts.

In the case of *Huggins v. Daley*, 99 Fed. Rep., 606, the court quotes with approval from the case of *Oil Co. v. Fretts*, 152 Pa., 451, this language:

"He could not be compelled to put down another well, and he not being bound, the lessor was not bound either; for the only consideration left to him was the prospective oil royalties and gas rentals which the lessee was in a position to defeat. *Contracts, unperformed, optional as to one of the parties, are optional as to both.*"

Continuing, the court says:

"While most of the cases cited have gone on the ground of abandonment, the governing principle in all oil leases of the character under consideration is that *discovery* and *production* of oil is a condition precedent to the continuance or vesting of any estate in the demised premises; that such lease vests no present title in the lessee, and if, *at any time, the lessee has the option to suspend operations, the lease is no longer binding on the lessor for want of mutuality*; and where the only consideration is the prospective royalties to come from exploration and development, failure to explore and develop renders the agreement a mere *nudum pactum* and works a forfeiture of the lease, for it is of the very essence of the contract that work should be done."

In the case of *Steelsmith v. Gartlan*, 45 W. Va., 27, 44 L. R. A., 107, the Supreme Court of West Virginia says:

"He (the lessee) could not, as he himself maintains, be compelled to put down another well; and he not being bound, the lessor was not bound either, for the only consideration left to her was the prospective oil royalties and gas rentals which the lessee was in a position to entirely defeat. *Contracts, unperformed, optional as to one of the parties, are optional as to both.*"

In the case of *Eclipse Oil Co. v. South Penn Oil Co.*, 47 W. Va., 84, 34 S. E. Rep., 923, 20 Mor. Min. Rep., 234, in stating the general proposition said:

"A consideration mentioned which is not legally enforceable is equivalent to no consideration, and a contract dependent thereon is as much *nudum pactum* as if no consideration was named.

"Where two parties to an instrument enter into

mutual covenants which are interchangeable considerations for each other, if either party neglects or refuses to bind himself, he thus renders the instrument void for want of mutuality, and he cannot avail himself of it as obligatory upon the other by any subsequent act of his own, without the latter's consent.—*Dodge v. Hopkins*, 14 Wis. 630."

In the case of *Natural Oil and Pipe Line Co. v. Teel*, 67 S. W. Rep., 545, the Court of Civil Appeals of Texas, also applied this rule to an oil and gas lease. In the opinion holding such a lease void for want of mutuality, the court said:

"The absolute control the contracts gave him in respect to performance of the conditions subsequent, and the absence of any right of the vendor to insist on performance, render the same objectionable for want of mutuality. The work was not begun, hence, no equities exist in favor of the appellants. They were not bound to perform, and could abandon the matter at any time. Under these circumstances, the appellees were also not bound, and they have a right to annul the contract."

In Donahue in his work on "*Petroleum and Gas*," at page 155, the author states the rule supported by authorities, thus:

"Where an oil and gas lease fails to bind the lessee to prosecute the work diligently, and the consideration for the lease is a part of the oil and gas produced, the lease is void for want of mutuality.—*Foster v. Elk Fork Oil and Gas Co.*, 90 Fed. Rep., 178."

"So where the lessee has a right to surrender the lease at any time and be released from all liabilities under the lease, the lease is void for want of

mutuality, when the consideration for the lease is a part of the product, hence, *the lessor may revoke the lease at any time before the lessee commences operation on the land for the production of oil or gas.*—*Eclipse Oil Co. v. South Penn Oil Co.*, 47 W. Va., 84, 34 S. E. Rep., 923."

"So a lease giving the lessor a part of the oil produced as a consideration for the lease, and so much a well for gas, and, in case no well is sunk, the lease to be null and void, unless the lessee pay a certain sum in advance for each quarter, the lease is but an option and does not bind the lessee to pay any sum, and *may be avoided by either party.*—*Snodgrass v. South Penn Oil Co.*, 47 W. Va., 509, 35 S. E. Rep., 820."

"Since the lease which does not bind the lessee to do anything and permits the lessee to surrender the lease at any time, such a lease confers no right on the lessee, other than a mere right to commence operations, so the death of the person who executed the lease *will put an end to the right of the lessee to enter.*—*Trees v. Eclipse Oil Co.*, 47 W. Va., 107, 34 S. E. Rep., 933."

"A lease, by which the lessee may postpone operations on the payment of a small sum of money, will not be upheld in equity, especially if the lessee led the lessor to believe that operations would begin in a short time after the execution of the lease, since *leases so drawn are regarded as options.*—*Eclipse Oil Co. v. South Penn Oil Co.*, 47 W. Va., 84, 34 S. E. Rep., 923."

In the case last cited the lease was given for a term of three years and contained a definite promise to pay a stipulated sum for failure to construct a well within a specified time. It reserved, however, the right to sur-

render at any time in language very similar to that employed in the leases in this case. Nothing had been done on the premises after the execution of the lease, although the "rentals" were paid. The *validity* of the lease was the point to be determined by the court, and in the opinion holding the lease *void*, this language was used:

"The effect of the last clause of the controverted lease appears to have been overlooked by counsel. It is in these words: 'And it is further agreed that the second party, their heirs or assigns shall have the right at any time to surrender this lease and be released from all money due and conditions unfulfilled; then and from that time, this lease and agreement shall be null and void, and no longer binding on either party, etc.' This clause apparently destroys this lease, or renders it invalid, at least until some consideration has passed from the lessee to the lessor. Lessee's counsel claim that he was not bound to do anything or pay anything until 18 months from the date of the lease, and in the meantime he has the right to surrender it, and, thereby be released entirely from any obligation whatsoever. This renders it to this extent, *nudum pactum* by which the lessor is not bound any more than the lessee; and until something is done in consummation thereof, either party may terminate it. *If one party may terminate an estate at his will, so may the other. Right to terminate is mutual.*"

In the case of *Reece v. Zinn*, 103 Fed. Rep., 97, the court in holding a lease of this kind absolutely void, said:

"The lease is void for want of mutuality, for the reason that it puts it within the power of the lessee to terminate the lease at will and *thereby confers the same power on the lessor.*"

In Illinois, as in most other jurisdictions, the rule has often been applied, as shown by the authorities cited and quoted from under a subsequent proposition.

Let us therefore, test the contracts which the complainants are seeking to enforce in this action, by the above well established rules.

By these contracts, the first parties "granted, demised, leased and let unto the party of the second part," certain tracts of land in Crawford County, Illinois, "for the sole and only purpose of mining and operating for oil and gas, and of laying pipe lines, and of building tanks, stations and structures thereon to take care of said products." This was the consideration moving *from the first parties*. What are they to receive for this demise,—for the granting of these valuable rights and privileges? Do these contracts give them the thing bargained for? Can they go into court and secure the thing promised as a consideration for this "grant and demise?" The contracts recite that this demise is made "for and in consideration of one dollar and the covenants and agreements hereinafter contained on the part of said party of the second part to be paid, kept and performed." What are these "covenants and agreements?" Let us see. The contracts say:

"IN CONSIDERATION OF THE PREMISES,

The said party of the second part covenants and agrees: 1st. To deliver to the credit of the first party, etc., the equal one-eighth part of all oil produced and saved from the leased premises; and, 2nd, to pay \$100 per year for the gas from each and every gas well drilled on said premises, the product of which is marketed and used off the premises, said payment to be made on each well within sixty days after commencing to use gas therefrom, and to be paid yearly thereafter while the gas from said well is so used."

Is there here any promise to do anything or to pay anything? Under what conditions are the first parties to receive their oil royalty or gas rental, which constitute the consideration for this grant? Is there any promise to "*drill*" a well, or to "*produce*" or "*save*" any oil or to "*market*" or "*use*" any gas, upon which the consideration depends, and in fulfillment of the express purpose for which the lease was given? When, if ever, would there be a default upon the part of the second party for which an action would lie, either for specific performance or for damages?

The leases further provide:

"Second party covenants and agrees to locate all wells so as to interfere as little as possible with the cultivated portion of the farm." Mark the language: "*All wells!*" What wells are to be so located? Is there any promise to "*locate*" any well or wells upon the premises? Not unless that promise is contained in the words immediately following: "*And, further, to complete a well within nine months from the date hereof.*"—Is there at last a promise to drill a well? Has the second party at last bound himself to do at least something in keeping with the purpose of the lease? Let us look again. Upon further examination it will be found that this is not a promise to complete a well, but it is an alternative promise "*to complete a well within nine months from the date hereof or pay at the rate of 25 cents per year, quarterly in advance, for each additional three months such completion is delayed!*"

Thus it turns out that all this excitement about "*mining and operating for oil and gas,*"—the laying of "*pipe lines, and building tanks, stations and structures to take care of said product,*"—the delivering of "*the equal one-eighth part of all oil produced and saved,*"—the paying of "*one hundred dollars per year for the gas from each*

and every well drilled on the leased premises,"—the locating of *"all wells so as to interfere as little as possible with the cultivated portion of the farm,"*—and the completing *"a well on said premises within nine months from the date hereof,"*—was a false alarm. Instead of promises, they are mere pretenses. There is not a promise in the entire instrument to do any of these things,—not one!

So far as the leases are concerned, they are not "for the sole and only purpose of mining and operating for oil and gas," because there is no promise whatever, in the instruments, to do any of these things. What, then, is the consideration which induced Susannah Smith and James A. Smith to execute these instruments whereby they are deprived, not only of the right to operate upon their own premises for oil and gas for a period of five years, or of procuring some one else to do so, but have parted with and conveyed to M. A. Walton and his assigns, to be bartered and sold and speculated upon, the prospective enhancement of the value of their premises by the finding of oil or gas in that vicinity, for that period of time?

What do the petitioners say,—what can they say,—they are required to yield in return for this demise, the granting of these privileges, the parting with such valuable rights and the prospective handsome returns from the discovery and production of oil and gas? We have seen that the leases contain no covenant, promise or agreement to do anything. The consideration, therefore, dependent upon development of the premises and the production of oil and gas,—*the very purpose for which these leases were given*,—is out of this case.

The only remaining obligation, then, to support these leases must be the promise to pay 25 cents a year for the failure to complete a well after the expiration of nine months. Is such a contention tenable? To so hold would

be to give to the leases a meaning directly contrary to that expressed in the instruments themselves. The leases recite that they were given "for the sole and only purpose of *mining and operating* for oil and gas." While, if it be held that these prospective money payments were the inducement which inspired this transaction, then it must be said that they were given for the "sole and only purpose," of *preventing* the mining and operating for oil and gas, because these payments are to be made only for delay,—while the premises are held dormant! And the entire instrument will be searched in vain to find any obligation assumed by the petitioners except the making of these payments, and even that, as we shall presently see, may be avoided under the surrender clause.

Unless we misinterpret the position of the petitioners in this respect, it is their contention that the leases in question were not given for the purpose of development and production, but for the purpose of preventing operation on these lands in competition with such operation on adjacent lands. This position, however, is not tenable for many reasons. Whatever may have been the secret purpose or intent of M. A. Walton and his assigns, in this respect, these leases, upon their face, show that they were not given for any such purpose. They were given "for the sole and only purpose of *mining and operating* for oil and gas," and not for the purpose of *preventing* such operation. As was said by the court in the case of *Federal Oil Co. v. Western Oil Co.*, 121 Fed. Rep., 674, at pages 676-7:

"It is undoubtedly true, as urged by the appellant, with respect to enterprises of this character, that a company proposing to obtain natural gas or oil in large quantities for sale or manufacturing purposes, finds it desirable to acquire exclusive right to search for the fugitive minerals in a large area or areas;

and, though it be not necessary for the proper development of the particular area to drill a well upon the land of all the several proprietors within the district, it is desirable and profitable to have no competing wells on the territory. That, however, was not the purpose of this contract."

It is no doubt true that a contract of the kind suggested, if honestly made, would be upheld. For a proper consideration, a land owner may forego the benefits he would receive from development and production, and the lessee may obtain whatever advantage it might be to him to be relieved from competing wells on the premises. But in such case, that must be the basis upon which the contract is made. The consideration, in such case, would be commensurate with the rents and royalties which the land owner would lose, and commensurate with the benefits the lessee would gain by holding the premises dormant. In such case, the lease would recite the purpose for which it is given, and not recite that it is given "for the sole and only purpose of *mining* and *operating* for oil and gas," when that, in fact, was not its purpose.

In such case, if the transaction be an honest one, the consideration for the grant would not be "the one-eighth part of all oil produced and saved from the leased premises to be delivered free of cost in pipe line to which second party may connect its wells," and "One Hundred Dollars per year for the gas from each and every gas well drilled on said premises, the product of which is marketed and used off the premises." Such a recital in the lease would be nonsense if not dishonest, if there was in fact, to be no well completed, and no oil or gas produced. Nor would the consideration be 25 cents a year, nor 25 cents an acre, if the land owner is to be deprived of all benefits he would receive from the production of oil and gas, but would be an amount commensurate with

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the value of the income he would receive from such production.

A lease may not be obtained for one purpose, for a consideration consistent with that purpose, and then converted into a lease for an entirely different purpose, whereby the lessor is deprived of the consideration for which it was given. This would be a fraud of the rankest type, and, unless we mistake the meaning and purpose of the petitioners, it is such a fraud that the court is asked to perpetrate upon the respondents in these cases.

Because of the want of any other obligation assumed, the petitioners are forced to contend that these money payments were the real inducement which led to the execution of these instruments, or admit the alternative that they are without consideration and lack mutuality of engagement. But will such a contention be entertained for a single moment? Can it be argued with any show of reason that for the mere sum of \$1, Susannah Smith or James A. Smith sold the prospective advantages they would receive by the discovery of oil or gas for a period of nine months, and that for the mere pittance of 25 cents a year, or 25 cents an acre, deprived themselves of such benefits for an additional term of four years and three months?

But, for the sake of the argument, let us concede, for the present, the contention of the petitioners in this respect. They insist that because of the promise to make these money payments, these contracts are binding upon the first parties for a period of five years, and ask this court to so hold. If the first parties are so bound, it is because the second party can be compelled to supply the consideration for which they so bound themselves. If not, then it is not a five year contract. A contract implies mutual obligation, and when it ceases to bind one of the parties, then it ceases to be a contract and binds no one.

To measure the duration of these contracts, therefore, it is necessary only to determine when and where mutuality ceased. And if it should turn out that this promise, like all the other apparent promises, is subject to the will of the lessee then, indeed, do the leases lack consideration and mutuality.

The leases recite that at the time of their execution, one dollar was paid. The remainder of the consideration was the covenants. Nine months were given in which to make the preliminary test—to complete a well. For this probationary period, both parties were bound, one by the payment of the dollar, and the other by the terms of the lease itself. During this period, neither party could rescind in so far as there had been performance. That is to say, the dollar paid could not be recovered.

While a court of equity, perhaps, during this period, would have refused to enforce these leases because inequitable, there being no means by which to compel the rendering of the real consideration, still, having paid a consideration, though nominal, for the right to make the development contemplated within the nine months, a court would probably refuse to cancel them during that time in actions brought for that purpose. But in order to extend that right beyond this probationary period, no possession having been taken, or development made, hence no rights vested, it was necessary to supply the additional consideration. This the first parties had no power to enforce. No court could have compelled operation on the premises, nor the payment of the six and one fourth cents for an additional three months period, except at the election of the second party. In other words, it was within the power of the second party to terminate these contracts at the end of nine months by surrendering the leases.

Here, then, mutuality of engagement ended, because

further performance by the second party could not be enforced. Here the spark of life which had lingered feebly through the probationary period, went out, and the lease ceased to be a contract and died in the hands of the lessee for want of that vitalizing element of every contract—mutuality of engagement. This spark could be kept alive beyond the probationary period only by performance within that period. At the expiration of the time given in which to exercise the option, the contract being unperformed, and *being optional as to one of the parties, it was optional as to both.*

This leads to another branch of this subject:

(c) *WANT OF MUTUALITY OF REMEDY.*

“A court of equity never interferes where the power of revocation exists.”

The lease contains this clause:

“It is agreed that the second party is to have the privilege * * * at any time to remove all machinery and fixtures placed on said premises; and, further, upon the payment of \$1, at any time, by the party of the second part, heirs, successors or assigns, shall have the right to surrender this lease for cancellation, after which all payments and liabilities thereafter to accrue under and by virtue of its terms, shall cease and determine, and this lease become absolutely null and void.”

Oil and gas contracts containing provisions of this character have frequently been before the courts. And while in some instances, where there had been performance, the courts have refused to cancel them in actions brought for that purpose *by the lessor*, it is also true that until these cases were decided in the trial court below, *no court has ever yet enforced such a contract*, either by

decreeing its specific performance or by enjoining its breach or in any manner at the instance of one in whose favor the right of revocation is reserved when there was neither performance, nor its equivalent. Most courts have unhesitatingly declared them absolutely void.

While the tendency has been to look upon "oil contracts" with suspicion and to scrutinize their every provision with scrupulous care, and to construe them most strictly against the lessee, as shown by the authorities previously cited and quoted from, the rule for which we are now contending has been many times applied with much vigor to other kinds of contracts, both where relief by specific performance and by injunction was asked.

We will first call attention of the court to a few cases in which the courts have applied the rule to contracts other than oil leases.

In the case of *Southern Express Co. v. The Western N. C. R. R. Co.*, 99 U. S., 191, the above rule was applied in a most summary manner. In speaking for the court, Mr. Justice Swayne, after stating the case, said:

"But we need not pursue the subject further, because there is one provision of the contract in this case which is fatal to the relief sought. *A court of equity never interferes where the power of revocation exists. Fry Specif. Perform.*, 64.

"The contract stipulates that after the first year, it shall cease upon the payment of \$20,000 and interest. This might be made immediately upon the rendition of the decree. The action of the court would thus become a nullity."

In the case of *Iron Age Publishing Co. v. Western Union Tel. Co.*, 83 Ala., 498, 3 South Rep., 449, 3 Am. St. Rep., 759, where the complainant sought to enjoin a breach of a contract determinable at will, the court said:

"We can tie the hands of the Associated Press and the other defendants by injunction, forbidding the delivery of the press dispatches to any one else than the complainant, as prayed for, and leave the complainant free to terminate the contracts at its will without limitation of time or circumstances, or to perform its duties as correspondent as negligently or diligently as discretion may dictate. * * * The first decree suggested would be entirely opposed to all equity precedents and practice; the settled rule being that the courts will not interfere by injunction in cases of this kind, if, indeed, in any case, where the defendant can not be made secure in his rights and remedies for violation of duties imposed on the complainant by the contract sought to be enforced. *Bromley v. Jeffries*, 2 Vern., 415; *Richmond v. Dubuque, etc. R. R. Co.*, 33 Iowa, 422, and cases cited on page 486."

In the case of *Rutland Marble Company v. Ripley*, 10 Wall. (U. S.) 339, 359, the principle applicable to this question is stated by Mr. Justice Field in the following paragraph:

"Another reason why specific performance should not be decreed in the case is found in the want of mutuality. Such performance by Ripley could not be decreed or enforced at the suit of the marble company, for the contract expressly stipulates that he may relinquish the business and abandon the contract at any time on giving one year's notice. And it is a general principle that when, from personal incapacity, the nature of the contract, or any other cause, a contract is incapable of being enforced against one party, that party is equally incapable of enforcing it specifically against the other, though its execution in the latter way might in itself be

free from the difficulty attending its execution in the former."

In the case of *Rust v. Conrad*, 47 Mich., 499, 41 Am. Rep., 720, the Supreme Court of Michigan by Judge Cooley, states the rule in such manner as to leave no doubt as to its correctness:

"The contract was not one which a court of equity will enforce. By its terms, the lease to be given under it might, at any time, be terminated by the lessee as to the whole land or any part of it not less than eighty acres, on their giving thirty days' notice of intention to do so. The continuance of the lease, if one should be given, would therefore depend on the will of the lessee, who might immediately terminate it. The contract, therefore, lacks mutuality and equality; and not being mutual or equal, lacks equity, and for that reason should not be enforced." And further:

"But the court will also refuse to interfere in any case, where if it were to do so, one of the parties might nullify its action through an exercise of a discretion which the contract or the law invests him with. The refusal, in such case, does not depend, of necessity, upon any illegality, inequality or unfairness, but it is sufficiently based upon the impropriety of imposing on the judge the labor, and on the public the expense of an investigation of disputes, when the circumstances are such as to preclude any judgment that may be rendered from being final. *No court can, with reason, be called upon to do a vain thing.*"

In the case of *Fowler Utilities Co. v. Gray*, 168 Ind., 1, 79 N. E. Rep., 897, will be found an exhaustive discussion of this subject of negatively enforcing a contract, determinable at the will of the complainant, by enjoining its breach. In the opinion the court says:

"The general rule is that an injunction will not be granted to restrain a breach of contract by a defendant when the complainant's promises are of such a nature that they could not be specifically enforced, unless they have been already performed. 22 Cyc. 850. This rule is founded upon a want of mutuality. The term, 'contract,' implies mutual obligation, and, in general, contracts, other than options, are not enforceable unless both parties thereto are bound, so that an action could be maintained by each against the other, for a breach." (Citing authorities.)

In the case of *Alworth v. Seymore*, 44 N. W., 1030, (Minn.) the court announced the same rule in these words:

"And specific performance will not be decreed unless the court can, at the time, enforce the contract on both sides, so that the whole agreement will be carried into effect according to its terms. If this can not be judicially secured on both sides, it ought not be compelled on one side and the other left at liberty to perform or not, or to perform in such a way as suits his own interest. *Fry Spec. Per. Sec.* 440; *Pom. Eq. Jur. Sec.* 1405 and notes; *Pom. Spec. Per. Sec.* 165, 166."

In the case of *Welty v. Jacobs*, 171 Ill., 624, 49 N. E. Rep., 728, the rule is announced in a very lucid manner, as applied to the subject of "negatively" enforcing a contract of this kind by enjoining its breach. In course of the opinion, the court said:

"The bill of complaint in this case, though not strictly a bill for the specific performance of a contract, is in substance a bill of that kind. In 3 *Pom. Eq. Jur. Sec.* 1314, it is said: 'An injunction restraining the breach of a contract is a negative spe-

cise enforcement of that contract. The jurisdiction of equity to grant such an injunction is substantially coincident with its jurisdiction to compel a specific performance. Both are governed by the same doctrine and rules. It may be stated, as a general proposition, that whenever the contract is one of a class which will be affirmatively specifically enforced, a court of equity will restrain its breach by injunction, if this is the only practical mode of enforcement which its terms will permit.'

"It is plain that, as a general rule, to enjoin one from doing something in violation of his contract, is an indirect mode of enforcing the affirmative provisions of such contract, although such an injunction may often fall short of accomplishing its object."

The cases of *Chicago, etc., Co. v. Town of Lake*, 130 Ill., 42, 22 N. E. Rep., 616; *Cleveland v. Martin*, 218 Ill., 73, 75 N. E. Rep., 772, and *E. St. L. R. R. Co. v. City of E. St. Louis*, 182 Ill., 433, 55 N. E. Rep., 533, are also injunction cases and are to the same effect.

Some confusion has arisen in relation to the application of this rule because of a failure to distinguish between the impotency due to the nature of the contract itself, and that arising from the nature of the subject-matter of the contract.

Where, by reason of the nature of the contract, it can not be enforced against one of the parties, the courts will refuse to enforce it against the other, either affirmatively by decreeing specific performance, or negatively, by enjoining its breach. Where, however, the contract being legal, equitable and mutual, but because of the nature of the subject-matter, the court is unable to enforce it affirmatively by decreeing its specific performance, relief will be granted by enjoining its breach.

The leading case upon this subject is the English

case of *Lumley v. Wagner*, 1 De Gex M. & G., 604. In that case, the defendant made a contract with the plaintiff to sing at his theater, and not to sing at any other, during a certain period. The court did not attempt to enforce the specific performance of the contract, but granted the plaintiff all the relief possible by enjoining the defendant from singing at any rival theater during the period fixed by the contract. Here the affirmative relief could not be enforced for the reason that the court could not compel the defendant to properly perform, hence, the negative remedy. This feature is illustrated in the case of *De Rivafloli v. Corsetti*, 25 Am. Dec., 533, in which the chancellor, in a joocular vein, recites the old adage, "A bird that can sing, and will not sing, must be made to sing."

There are many contracts which will be enforced negatively by enjoining their breach which, because of the nature of the *subject-matter*, could not be enforced by the affirmative remedy. Among these are contracts involving the performance of continuous personal duties, requiring prolonged supervision, and those requiring especial skill, talents, or accomplishments, such as singers, actors, lecturers, artists, skilled, mechanics, base ball players, and the like. But before a contract will be enforced by either method, the contract, itself, must be such as to come within the range of equitable principles.

Reverting to the leading case of *Lumley v. Wagner*, *supra*: If in that case the complainant had failed to assume any obligation enforceable against himself—had not bound himself to furnish the theater in which the defendant was employed to sing; had not bound himself to pay the defendant for his services or to render any consideration whatever for such services except at his own choice, and had reserved the right to terminate the contract at any time—would the court have enforced such

a contract by granting any relief, at the behest of him who thus was not bound? If he had gone into court basing his demand for equitable relief upon such a contract, and that too, without having done equity by performance or offering to do equity by tendering performance, or offering in his bill to do and perform whatever the court may decree ought to be done on his part, then the case of *Lumley v. Wagner* might have become a leading case, but on quite a different point.

In Merwin on "Equity and Equity Pleading," at page 442, the author states that there are three important classes of cases relating to personal property or personal services in which a court of equity will thus interpose:

"(1) Where the owner of a patent has agreed to give the plaintiff an exclusive license to make or sell the article manufactured under it, equity will enjoin him from so licensing a third person, or from delivering the patented articles to others."

Illustrative of this class, is cited the case of *Singer Sewing Machine Co. v. The Union Buttonhole, etc. Co.*, 1 Holmes, 253.

"(2) Where one has contracted not to engage in a particular trade or calling, or in a particular business, within a certain territory, or for a certain period, equity will enjoin a breach of his contract."

Illustrative of this class, is cited *McClurg's Appeal*, 58 Pa. St., 51, in which a physician was enjoined from violating his contract to not practice his profession within a certain radius.

"(3) Where one has engaged to perform certain services for the plaintiff, and not to enter any competing service, equity will enjoin him from entering such service, although it cannot compel him to perform the services for plaintiff."

Illustrative of this class is cited the case of *Lumley*

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v. Wagner, supra, and in note 2, on page 443, this case is explained and distinguished.

We will now see how the rule has been applied to oil and gas leases.

In the case of *Federal Oil Co. v. Western Oil Co.*, 112 Fed. Rep., 373, from which we have previously quoted under another branch of this case, the court further says:

"And for a still further reason the court must refuse to enforce this lease. The lease expressly provides that the complainant shall have the right to remove all its property from the demised premises at any time, and may cancel and annul this contract, or any part thereof, at any time. *It is a well settled rule of law that a lease which is determined at the will of one party, is equally determined at the will of the other.*"

"And for a still further reason the court must refuse to enforce this lease. The court will not decree that one party shall specifically perform a contract which the other party, at its option, may refuse to carry out. It is of the essence of a decree that it should be mutually binding and conclusive on both parties. It would be an idle formality for the court to enter a decree against the defendants in this case, for the reason that the complainant has the right to render the decree ineffective at any moment it pleases. *Marble Company v. Ripley*, 10 Wall., 339, 19 Law Ed., 955."

The above case was taken to the U. S. Circuit Court of Appeals for the Seventh Circuit by appeal, and in affirming the decision of the Circuit Court for the District of Indiana, that court in *Federal Oil Co. v. Western Oil Co.*, 121 Fed. Rep., 674, re-asserted the rule in these words:

"The appellant had the right at any time to

remove its property and cease operations without respect to the interest of Bradford, and with respect only to its own interest; and it could cancel and annul the contract, or any part thereof, at any time. There was here an entire want of mutuality—an utter absence of obligation on the part of the appellant. *Equity will not specifically enforce a contract against one party when it can not be specifically enforced against the other. Marble Co. v. Ripley*, 10 Wall., 339, 359, 19 Law Ed., 955; *Kerrick v. Hannaman*, 168 U. S., 328, 336, 18 Sup. Court, 135, 42 Law Ed., 484."

The somewhat recent case of *Pantages v. Grauman*, 191 Fed. Rep., 320, was an equity case, seeking an injunction, and is exceedingly instructive on the question of "mutuality of remedy." The case is from the Circuit Court of Appeals for the Ninth Circuit. In the opinion it is said:

"It is a fundamental principle that specific performance of a contract will not be decreed unless it can be rendered obligatory upon both parties. In other words, the remedy must be mutual; otherwise, it cannot be invoked. *Marble Co. v. Ripley*, 10 Wall., 339, 19 L. Ed., 955; *Firth v. Ridley*, 33 Beavan's R., 516; *Shubert v. Woodward*, 167 Fed., 47, 92 C. C. A., 509; *Duff v. Hopkins*, (D. C.) 33 Fed., 599, 608; *Pullman Palace Car Co. v. Texas & Pac. R. Co.*, (C. C.) 11 Fed., 625. Nor it is held, will the remedy avail unless both parties at the time the contract is executed have the right to resort to equity for its specific enforcement. *Norris v. Fox et al.*, (C.C.) 45 Fed., 406."

In referring to the case last above cited, the court said:

"The case of *Norris v. Fox et al.*, *supra*, is of marked analogy to the present controversy. There

Norris agreed to procure a warranty deed conveying to Fox certain land in consideration that Fox would bind himself to convey to Norris, or some one named by him, certain other land. At the time the contract was entered into, the land which Norris agreed to convey, was vested in one Robbins. Norris subsequently obtained a deed from Robbins to Fox, which the latter refused to accept. Norris then sued Fox for specific performance, but it was decided that the suit could not be maintained because of want of mutuality of remedy; the court saying:

‘And where a contract, when executed, is not specifically enforceable against one of the parties, he cannot by subsequent performance of the conditions that could not be specifically enforced, put himself in a position to demand specific performance against the other party. *Hope v. Hope*, 8 De. Gex, M. & G., 731, 736; *Fry Spec. Perf.* (3d Ed. Amer. Notes) Sec. 443. In the case at bar, the agreement of Norris to procure a warranty deed of land at the time belonging to another, was of that nature that only an action at law would lie for a breach of the agreement. As Fox could not compel specific performance of the contract when made, and only had his remedy at law, by a suit for damages, the complainant must resort to the same remedy.’ ”

Under the preceding branch of this proposition are many “oil cases” cited in which the rule was many times applied and to which we invite attention without repeating them here.

The Rule in Illinois.

While the rule for which we are contending has long obtained in Illinois and has been many times applied to other classes of contracts, and is an established doctrine

in that state, the Supreme Court had first occasion to apply it to an oil lease in the case of *Watford Oil and Gas Co. v. Shipman, et al.*, 223 Ill., 9. That was an action brought by a prior lessee to enjoin a subsequent lessee from operating on certain premises for oil and gas, and for other relief. The court held that the bill was properly dismissed for want of equity.

Later, in the case of *Ulry v. Keith*, 237 Ill., 284, the Supreme Court of Illinois, in an elaborate opinion, after reviewing the authorities, reiterates the same rule as that applied in the Watford case with approval, and also places the holding on the ground of *stare decisis*.

In *Cortelyou v. Barnsdall*, 236 Ill., 138, the court cancelled a lease of this character in an action brought for that purpose by the lessor holding the same to be a mere option which the lessor may withdraw at any time before the lessee has done something binding himself to exercise the option.

As we will have occasion to subsequently refer to the Illinois cases under the subject "*Stare Decisis*," we will defer a further examination of these authorities until we reach that subject.

A Conditional Decree.

In an attempt to parry the effect of a want of mutuality in the contracts in controversy, in their brief filed in the Circuit Court of Appeals, counsel for the petitioners said:

"The court may enter a conditional decree, thereby assuring performance by plaintiffs during the continuance of the injunction against the defendants."

It is sufficient answer to this suggestion to say that the decrees we are assailing are not "conditional."

But applying the suggestion to these cases, what sort of a condition could the court impose that would assure

performance? Performance of what? The petitioners did not promise to perform anything except to pay 25 cents a year while holding the premises dormant. The only effect of a surrender would be to cut off these payments. The only "conditional decree" that the court could enter, under these leases, would be to enjoin the respondents so long as the petitioners should continue to make these payments, and to become self-dissolving upon their failure to pay. No court could impose the condition that the appellees carry out the purpose of the leases by drilling and operating for oil and gas, without making a new lease for the parties, because they did not promise to do anything of the kind. And to say that the court may make a new contract for the parties and render a decree enjoining one party so long as the other party shall perform the provisions of this new court-made contract, and to be self-dissolving upon his failure to perform these obligations which he had never assumed, would be to inaugurate a brand of specific performance hitherto unknown.

PROPOSITION V.

No Tender of Performance.

The complainants should not recover in this action for the reason that they have neither done equity by performing nor by tendering performance of the optional provisions of the lease, nor in their bill do they offer to do equity by offering to perform whatever the court shall decree ought to be done on their part.

The above proposition is based upon a rule as old as equity jurisprudence. But no useful purpose would be served by tracing it through the centuries, however interesting it would be to do so.

In the case of *Federal Oil Co. v. Western Oil Co.*, 121

Fed. Rep., 674, which governed the decision of these cases in the Circuit Court of Appeals, the court states the rule in these words:

"Equity will not specifically enforce a contract against one party when it can not be specifically enforced against the other. *Marble Co. v. Ripley*, 10 Wall., 339, 359, 19 Law Ed., 484. Not only could this contract be not enforced against the appellant, for want of obligation assumed, but it does not offer by its bill to do that which was the obvious intent of the contract it should do, namely, to drill a well for oil and gas. Tender of performance is absolutely necessary, especially in a case of optional contract. *Kelsey v. Crowther*, 162 U. S., 404, 16 Sup. Ct., 808, 40 Law Ed., 1017; *Richards v. Green*, 23 N. J. Eq., 536."

In the case of *Kelsey v. Crowther*, above cited, the Supreme Court of the United States, by Mr. Justice Shiras, said:

"To entitle themselves to a decree for the specific performance of a contract to sell land, it has always been held necessary that the purchasers should tender the purchase money. This is the rule in the ordinary case of a mutual contract for the sale and purchase of land. And the rule is still more stringently applied in the case of an optional sale, like the present one, where time is of the essence of the contract, and where Crowther could not have enforced specific performance. In such a case, if the vendee wish to compel the other to fulfill the contract, he must make his part of the agreement precedent, and can not proceed against the other without actual performance of the agreement on his part, or a tender and refusal. *Bank of Columbia v. Hanger*, 26 U. S., 1 Pet., 464; *Rutland Marble Co. v. Ripley*, 77 U. S., 10 Wall., 359."

In *Dorsey v. Packwood*, 12 Howard, 126, the court, by Mr. Justice Grier, said:

"But there is one characteristic necessary to give it validity as a binding contract, in which it is entirely deficient. It wants mutuality. It imposes no obligation on Dorsey whatever. He is not bound either to render services or pay money as a consideration for one half the land. Packwood could not support a suit upon it to compel Dorsey to do anything. • • •

"When the obligation is mutual, the party asking a specific performance must show that he has been in no default in not having performed the agreement on his part, and that he has taken all proper steps towards the performance. He must show himself desirous, prompt and eager to perform the contract."

In *Watts v. Waddle*, 6 Peters, 339, it is said:

"The aid of a court of chancery will be given to either party who claims specific performance of a contract, if it appears that in good faith, and within the proper time, he has performed the obligations which devolved upon him."

In *Boone v. Missouri Co.*, 17 Howard, 340, it is held:

"He who asks specific performance of his contract, must show performance, or offer to perform on his part."

In the case of *Bank v. Hanger*, 1 Peters, 455, the syllabus of the decision contains the following:

"An averment of performance is always in the declaration upon contracts containing dependent undertakings, and the averment must be supported by proof."

"In such cases, if either vendor or vendee wishes to compel the other to fulfill his contract, he must make his part of the agreement precedent, and can

not proceed against the other without actual performance of the agreement on his part, or a tender and refusal."

In *Colson v. Thompson*, 2 Wheaton, 336, it is said:

"The plaintiff who seeks the specific performance of an agreement, must show that he has performed, on his part, the acts which formed the consideration for the alleged undertaking on the part of the defendant."

In Illinois, as in every other jurisdiction, the same rule obtains. In the case of *Thayer v. Wilmington S. Min. Co.*, 105 Ill., 540, the same doctrine is announced and in *Chicago Mun. Gas Light Co. v. Town of Lake*, an injunction case,—the court said:

"One of the principles which govern, where a bill for specific performance is brought, is, that the complainant must show that the contract has been fully and fairly, and in good faith, performed."

It will be observed that in both the State and Federal Courts, the same rule is applied in actions to enforce a contract by the negative method as by the affirmative method. The same principles apply in both kinds of actions, and the expression, "specific performance," is used indiscriminately.

Not only is the rule under consideration found in decided cases, but it is universally announced in the text books treating upon the subject.

In *Story's Equity Jurisprudence*, Sec. 736, on this subject, it is said:

"In cases of covenants and other contracts, where specific performance is sought, it is often material to consider how far the reciprocal obligations of the party seeking relief, have been fairly and fully performed. For, if the latter have been disregarded, or they are incapable of being substantially performed

on the part of the party seeking relief, • • • courts of equity will not interfere."

And in *Pomeroy's Specific Performance*, Sec 330, the rule is stated in these words:

"The party seeking aid in a court as an actor,—generally the plaintiff,—must not only show that he has complied with the terms, so far as they can be complied with, at the commencement of the suit; he must also show that he is able, ready and willing to do those other future acts which the contract stipulates for as a part of its specific performance."

While the complainants have filed in this case what they denominate a "stipulation," in which they say that if given this property in its improved condition, they will not avail themselves of the "surrender clause" by surrendering the property, they do not offer to do equity by carrying out the spirit, purpose and intent of the contract by performing that which was their duty to do, but which they did not bind themselves to do, and have wholly failed to do. At most they simply say that they will hold fast to all which is thus given them. This "stipulation" is, to say the least, an innovation, and without further considering its merits at this time, we submit that it does not satisfy nor avoid the rule stated in this proposition.

Not having done equity by performing that which was their plain duty to do; and not having offered to do equity by tendering performance, but being in these respects wholly in default, and not having offered in their bill to do and perform whatever the court may decree should be done on their part, the complainants are not in a position to invoke the aid of equity.

Applying the "well established principles of equity" as stated by the court in the case of *Federal Oil Co. v.*

Western Oil Co., supra, at page 676, the lease in this case will not be enforced because it is not "upon a valuable consideration;" it is not "perfectly fair, equal and just in its terms and in its circumstances," and the situation is not "such that the remedy of specific performances will not be harsh and oppressive." Nor is the contract "such that the court is able to make an efficient decree for its specific performance, and to enforce that decree when made."

In their brief filed in the court below, these petitioners assumed to answer this proposition in these words:

"In reply to propositions V and VI, that the completion or tender of completion of a well is here an academic question and was, in fact, prevented by the occupancy of Solley, Johnson and Hennig, and their predecessors in title."

If it were a fact that Solley, Johnson and Hennig had been in possession of the premises continuously from the date of the Walton lease (under which the petitioners claim), this would be no excuse for their failure to at least offer to perform the optional provisions of their lease, nor would this fact prevent them from offering in their bill to do equity by offering to perform whatever future acts the court may decree as a condition upon which the injunction asked might be granted. There would then be something upon which to base a "conditional decree." The court might then enter a decree enjoining the defendants, if the circumstances would warrant it, conditioned upon the doing of the things by the complainants which they offer in their bill to do, and to be "self-dissolving" upon their failure to do these things.

But is it true that the petitioners have been prevented from performing the optional provisions of their lease

"by the occupancy of Solley, Johnson and Hennig, and their predecessors in title?"

Their leases were executed on the 22nd day of May, 1905, and inferentially, at least, required the completion of a well within nine months from that time. Solley, Johnson and Hennig were not in possession of the premises for two years after that date, and their "predecessors in title" (Little & Willett) were not in possession for more than a year and a half thereafter.

This claim was an after-thought. Nor does the petitioner, Mr. Gillespie, who was the active manager of the business, claim that this was the reason for their failure to perform the optional provisions of their lease. His testimony taken in these cases shows that they remained idle because they "were not ready to drill,"—because in their judgement, "it was not time to drill," but he is unable to give any reason for this "judgment."

On page 255 of the transcript (in the court below) is found the testimony of Mr. Gillespie on this subject as follows:

Q. Then, if you were so anxious and so able, why didn't you go on and put down a well?

A. Because, in my judgment, I didn't think it was a proper time.

Q. Oh, that was it. It was because you were waiting to see whether or not the developments in the neighborhood would warrant it—that was it, wasn't it?

A. No sir, not exactly.

Q. Then, what was the reason?

A. Why, just because I was not ready to drill.

Q. Why not? You testified that you were ready, willing and anxious at all times.

A. Well, I hope that I have some judgment as to when I ought to drill in leases I am interested in.

Q. What is it that controls your reasons in that particular?

A. Well, my reasons, sir.

Q. Tell us one.

A. Well, one of them would be, if it was the winter season, muddy roads, might not want to make any.—

Q. Well, it has not been winter ever since the fall of 1905?

A. Part of it.

Q. Fall and spring and summer, some three or four different recurrences of those seasons?

A. From when?

Q. So it hasn't been winter time that has kept you from making the developments on there wholly?

A. Just as much as anything else.

And on page 256 is the following:

Q. You owned it and controlled it? (The Walton lease.)

A. Yes sir.

Q. And could have put down a well any day that you wanted to, couldn't you?

A. If I had felt like it I could, yes sir.

Q. Yes, but you didn't feel like it?

A. Yes Sir.

Q. That's your reason for not doing it?

A. No, not exactly.

Q. Then give us the reason.

A. My reason is my judgment told me it was not the proper time to drill there.

Q. That's the only reason you have to give?

A. Other reasons were that it was the winter season, and there was no use incurring expense when I could drill it in the summer just as well.

Q. Well, now, you had it in the summer of 1906 didn't you?

A. No sir.

Q. What prevented you from drilling in 1906?

A. It was in possession of Wileox.

Q. Well, but you had a lease on it?

A. Yes, but he had possession.

Q. Why didn't you take possession?

A. I wasn't ready to take possession.

From the foregoing it is plain that the petitioners have no valid reason or excuse for not performing or offering to perform the optional provisions of their leases before bringing these actions. And, not having done equity in this respect before bringing these actions, there is even less excuse for their not offering to do equity by offering in their bill to do and perform whatever the court might decree should be done on their part in case of granting the relief prayed for.

PROPOSITION VI.

Condition Precedent.

The completion of a well upon the demised premises within the time stipulated (nine months) was a condition precedent to the vesting of any estate. And at the expiration of the time given in which to make the preliminary test, none having been made, the lessor had a right to avoid the lease by leasing to another.

The lease in controversy conveyed no estate to the petitioners, but was a mere option to be accepted by the lessee within nine months. The completion of the well within the time specified was a *condition precedent* to the vesting of any estate, and after the expiration of that time, no well having been completed upon the premises, the lessor was at liberty to lease the land to another.

Technical words are not necessary to raise a condi-

tion. Indeed, a condition will be implied from the nature and subject-matter of the contract,—from the purpose of its execution and object to be attained. In this case, by the lease in question, the lessee acquired no title to the land, or to the oil and gas, but merely a license to go upon the premises for the purpose of exploration. Nine months were given in which to make a test of the premises. If such test would result in the finding of oil or gas, then an estate would vest in the lessee for the purpose of production. *The testing provided for was a condition precedent to the vesting of any estate*, and if oil or gas were found, the production thereof would be a condition precedent to the continuance of the estate acquired by the finding of oil or gas. The authorities are numerous and conclusive upon this subject.

In the case of *Parish Fork Oil Co. v. Bridgewater Gas Co.*, 51 W. Va., 583, 59 L. R. A., 566, the lessee constructed a well upon the premises, and then ceased operation, relying upon his “vested estate” to enable him to hold the premises for the purpose of speculation. But the court held that while the finding of oil and gas was a condition precedent to the vesting of any estate, the production of these substances was a condition precedent to the continuance of the estate so acquired. In the opinion the court used the following language:

“Until oil is discovered in paying quantities the lessee acquires no title under such lease. It simply gives a right of exploration. *Steelsmith v. Gartlan*, 45 W. Va., 27, 29 S. E. Rep., 987, 44 L. R. A., 107; *Oil Co. v. Fretts*, 152 Pa., 451, 25 Atl. Rep., 855; *Crawford v. Ritchie*, 43 W. Va., 252, 27 S. E. Rep., 220.

“After the discovery of oil in paying quantities, it is held that title does vest in the lessee, but there is no case which goes so far as to announce that after

mere discovery of oil the lessee, upon the assumption of a vested interest or title, may cease operation, refuse to develop the property, tie up the oil by his lease, and simply hold it for speculative purposes or to await his own pleasure as to the time of development.

"A well settled principle of law is that a contract shall be construed as a whole, and in the light of the purpose and objects for the accomplishment of which it was made. Oil leases are no exception to the rule, and, as the subject-matter of the lease is peculiar in its nature, the courts have given this principle great latitude in their construction. They are executed by the lessor in the hope and with an express or implied condition that the land shall be developed and oil produced. When production takes place, the lease is mutually beneficial.

"The royalty, which it is stipulated in all these leases that the land owner shall receive, is generally the moving cause of the execution of the lease. If there is one principle that is asserted in *Steelsmith v. Gartlan*, more vigorously and with more emphasis than any other, it is that the lessee shall proceed to make the lease profitable to both parties, and that he shall not be permitted to tie up the land. *The 'testing' provided for was manifestly a condition upon which the lease depended.* If such test showed no minerals, then the contract was at an end; if it, on the other hand, showed the presence of valuable mines, then the lessees were bound to operate them in good faith for the joint profit of themselves and the owners of the fee.

"*Technical words are unnecessary to raise a condition.* If a fair and reasonable construction of the instrument shows that a lease shall depend upon

the doing or not doing something essential to the purposes of the contract, *the law implies the conditions.*'—*Petroleum Co. v. Coal, Coke & Mfg. Co.*, 89 Tenn., 381, 18 S. W. Rep., 65."

" 'It would be unjust and unreasonable, and contravene the nature and spirit of the lease, to allow the lessee to continue to hold his term, a considerable length of time, without making any effort at all to mine for gold or other metals. Such a construction of the rights of the parties would enable him to prevent the lessor from getting his tolls under the express covenant to pay the same, and deprive him of all opportunity to work the mine himself or permit others to do so. The law does not tolerate such practical absurdity, nor will it permit a possibility of such injustice.'—*Conrad v. Morehead*, 89 N. C., 31."

" 'Forfeiture for non-development or delay is essential to private and public interest in relation to the use and alienation of property. In general, equity abhors a forfeiture, but not where it works equity and protects a land owner from the *laches* of a lessee, whose lease is of no value till developed.'—*Munroe v. Armstrong*, 96 Pa., 307."

" 'A land owner is entitled to his royalty as promptly as it can be had. The danger of drainage from his small holdings is increased by delay, and the resulting damage, not being susceptible of pecuniary measurement, is therefore not compensable. No such lease should be so construed as to enable the lessee, who has paid no consideration, to hold it merely for speculative purposes, without doing what he stipulated to do, and what was clearly in the contemplation of the lessor when he entered into the agreement.'—*Huggins v. Daley*, 99 Fed. Rep., 606, 48 L. R. A., 320."

“ ‘If a farm is leased for farming purposes, the lessee to deliver to the lessor a share of the crops in the nature of rent, it would be absurd to say, because there was no express engagement to farm, that the lessee was under no obligation to cultivate the land. An engagement to farm in a proper manner and to a reasonable extent is necessarily implied. The clear purpose of the parties to this lease was to have the land developed, and the half yearly payments and the other sums stipulated were intended not only to spur the operator, but to compensate Ray for the operator's delay or default.’—*Ray v. Gas Co.*, 138 Pa., 576, 20 Atl. Rep., 1065, 12 L. R. A., 290, 21 Am. St. Fed., 922.”

“ ‘If oil is found, then the right to produce becomes a vested right, and the lessee will be protected in exercising it in accordance with the terms and conditions of the contract.’—*Crawford v. Ritchie*, 43 W. Va., 252, 27 S. E. Rep., 220.”

“All the provisions of the contract must be effective, if possible. By its terms this lease is to be in force for the period of fifteen years from its date, and as much longer as the premises are operated for oil or gas. Another provision is that the lessor shall have one-eighth of the oil produced and \$50 per annum for each gas well. It is just as important to the lessor that, when discovery of oil is made, the land shall yield him his royalty as it is that discovery shall vest in the lessee title to the balance of the oil. If the lessee shall be permitted to sit down, and refuse to produce, after discovery, the lessor loses a part of what he contracted for. The contract bears no such construction as that. What the lessee acquired by discovery was the right to produce and take the oil, paying out of it the stipulated royalty,

and not title to the oil as it remains in the land without production. Hence this provision that, when a well is completed on the premises, all cash rentals shall cease, must be taken to mean that such cash rental shall cease only when a producing well is completed and operated on the premises, or that the completion of a non-producing well extinguishes the obligation to pay rent, and places it within the principle announced in *Steelsmith v. Gartlan*."

In the case of *Federal Oil Co. v. Western Oil Co.*, *supra*, Judge Baker used this language:

"Oil leases stand on quite different grounds from leases of other immovable property. The governing principle in gas and oil leases of the character in question is that *discovery and production of gas or oil is a condition precedent to the existence and continuance of any vested estate in the demised premises*. Where, as in this case, the only consideration is prospective royalties to arise from exploration and development, failure to promptly explore and develop the demised premises renders the agreement *nudum pactum*, and works a forfeiture of the lease, for it is of the essence of such a lease that the work of exploration shall be commenced and prosecuted with promptness."

In the case of *Steelsmith v. Gartlan*, *supra*, the Supreme Court of West Virginia used this language:

"A vested title can not ordinarily be lost by abandonment in a less time than that fixed by the statute of limitations, unless there is satisfactory proof of an intention to abandon. An oil lease stands on quite different grounds. The title is inchoate, and for the purpose of exploration only, until oil is found. If it is not found, no estate vests in the lessee, and

his title, whatever it is, ends when the unsuccessful search is abandoned."

Again, in the same case, the court says:

"When a lease provides the mode, manner and character of search to be made, implications in regard thereto are excluded as repugnant. And the demise for the purpose of operating for oil and gas for the period of five years is dependent upon the discovery of oil and gas in the search provided for, and, if such search is unsuccessful, the demise fails therewith, as *such discovery is a condition precedent to the continuance or vesting of the demise*. The lessee's title being inchoate and contingent, both as to the five years' limit and time thereafter, on the finding of oil and gas in paying quantities, did not become vested by reason of his putting down a non-productive well."

In the case of *Huggins v. Daley, supra*, Judge Brawley of the U. S. Circuit Court of Appeals, Fourth Circuit, said: "In cases of conditions precedent, the consideration is the *performance* of the thing stipulated to be done, not the promise." And further in the opinion he says:

"While most of the cases have gone upon the ground of abandonment, the governing principle in all oil leases of the character under consideration is that the *discovery and production of oil is a condition precedent to the continuance or vesting of any estate in the demised premises*; that such lease vests no present title in the lessee, and if, at any time, the lessee has the option to suspend operations, the lease is no longer binding on the lessor because of a want of mutuality; and where the only consideration is the prospective royalty to come from exploration and development, failure to explore and develop renders the agreement a mere *nudum pactum* and works a

forfeiture of the lease, for it is of the very essence of the contract that work should be done."

In concluding the opinion, the court said:

"We are of the opinion, upon the whole case, that the exploration for, and the development of, oil and gas was the sole consideration for this lease; that the provision requiring the boring of a well within ninety days, was a *condition precedent* to the vesting of any interest to the lessee, and that the forfeiture of \$50.00 was intended merely as a penalty to secure the drilling of a well, and, if paid, would have been merely compensation to the land owner for the right of the lessee to possession during the ninety days, and such payment would not be so far a compliance with the conditions of the lease as to vest in the lessee a title in the leased premises for a period of five years; that after the expiration of ninety days from the date of the lease, there being no provision therein for work to be done by the lessee in the development of the property which is the sole consideration therefor, the lessor had the option to avoid it."

In the case of *Poster v. Elk Fork Oil & Gas Co.*, 90 Fed. Rep., 178, on page 182, the U. S. Circuit Court of Appeals, Fourth Circuit, quotes with approval, the following:

"The demise for the purpose of operating for oil and gas for the period of five years, is *dependent on the discovery of oil and gas in the search provided for*; and, if such search is unsuccessful, the demise fails therewith, as such *discovery is a condition precedent* to the continuance or vesting of the demise. The lessee's title being inchoate and contingent, both as to the five year limit and the term thereafter on the finding of oil and gas in paying quantities, did not

become vested by reason of his putting down a non-productive well."

If this be true where possession had been taken, work begun and money expended in carrying out the purpose of the lease, what can be said of the cases at bar where no hand was raised or a dollar expended in carrying out the purpose for which the leases were given?

The case of *Gadbury v. Ohio etc. Co., supra*, was an action brought by the lessors to cancel a lease after a well had been completed, resulting in the finding of gas in abundant quantities. The lease provided for the completion of a well within forty days from the date of the lease, or in default thereof the payment of \$1.00 a day until a well was completed. It also provided for the payment of \$100 a year for the gas from each well "when marketed off the premises." Upon the completion of the well, it was closed and anchored and no gas was "marketed" off the premises, hence, no payment was made therefor. In the decision by the Supreme Court of Indiana, holding the lease void because of a breach of an implied condition, the court said:

"The grant in question, upon its face, appears to be a mere option to the grantee. Every express undertaking upon his part is subsidiary to the exercise of the option to explore and develop the real estate. The question arises, however, whether obligations to explore and develop the property may not be implied, and whether such undertakings, if implied, are not an essential part of the contract as to be treated as conditions. An implied condition may be inseparably annexed to a grant, from its essence and constitution, although no condition be expressed in words.—2 *Blackstone's Comm.*, 152; *Petroleum Co. v. Coal Co.*, 89 Tenn., 381.

"In determining whether a condition is to be

implied, it is important to note that the substantial consideration which moves a grantor to execute such a grant is the hope of profits or royalties if oil or gas is discovered. Even if the grantee in this case had paid the stated consideration of \$1.00,—a technically valuable consideration—yet we must construe the instrument with the fact in view that a more substantial reason or reasons prompted the making of the grant.—*Huggins v. Daley*, 99 Fed., 606; *Federal Oil Co. v. Western Oil Co.*, 112 Fed., 373.

“In an ordinary agricultural lease, where the rent is payable in kind, it would, of course, be implied that the tenant would farm the land, and the requirement is implied that lessees in mineral leases, upon royalties, will develop the property if exploration warrants it, where the minerals are stable, although the only result of a delay in operating would be to postpone the receipt of profits or royalties.—*Island Coal Co. v. Combs*, 152 Ind., 379; *McKnight v. Nat. Gas Co.*, 146 Pa. St., 185.

“If a duty to operate is to be implied in such cases, there is much more reason for the implication in a grant of the right to operate for oil and gas upon a royalty, owing to the migratory habit of the fluids. ‘Oil leases,’ it was declared in *McKnight v. Natural Gas Co.*, *supra*, ‘must be construed with reference to the known characteristics of the business.’ As said in another Pennsylvania case, ‘The nature of oil and gas, the pressure of the superincumbent rocks, and the vagrant habit of both fluids under pressure, enter into the contemplation of both parties to such an agreement.’—*Klepner v. Lemon*, 176 Pa. St., 502.

“In grants of the character in question, the title is inchoate, and for the purpose of exploration

only, until oil or gas is found in quantities warranting operation; and while the courts manifest a disposition to protect the grantee at this stage, as treating his interest as no longer postponed to the happening of a condition precedent, yet it is thoroughly settled that he cannot omit to develop the property and hold the grant for speculative purposes purely.—*Parish Fork Oil Co. v. Bridgewater Gas Co.*, 51 W. Va., 583, 42 S. E., 655; *Blue Stone Coal Co. v. Bell*, 38 W. Va., 297, 18 S. E., 493; *Guffey v. Hukill*, 34 W. Va., 49, 11 S. E., 754, 8 L. R. A., 759, 26 Am. St. Rep., 901; *Ray v. Natural Gas Co.*, 138 Pa. St., 576, 20 Atl., 1065, 12 L. R. A., 290, 21 Am. St. Rep., 922; *Venture Oil Co. v. Fretts*, 152 Pa. St., 451, 25 Atl., 723; *Klepner v. Lemon*, 176 Pa. St., 502, 35 Atl., 109; *Huggins v. Dacey*, 99 Fed., 606, 40 C. C. A., 12, 48 L. R. A., 320; *Federal Oil Co. v. Western Oil Co.*, 112 Fed., 373; *Hawkins v. Pepper*, 117 N. C., 407, 23 S. E., 434."

In the case of *Cortelyou v. Barnsdall*, 236 Ill., 138, 86 N. E. Rep., 200, the Supreme Court of Illinois has construed a lease of this character and held it to be a mere license which the lessor may withdraw before the lessee has done some act by which he binds himself to exercise the option.

The defendants most earnestly contend that under the leases in question, the lessee acquired no vested estate either in the soil or in the oil or gas; that the drilling of a well within the nine months given in the lease for that purpose, was a *condition precedent* to the vesting of any title in the lessee; that at the expiration of that period, nothing having been done by the lessee whereby he became bound to carry into effect the purpose of the leases, the lessors were at liberty to avoid them. And, not having been out of possession of the premises, they could not

re-enter upon themselves, but any affirmative act evincing their intention to do so, such as the giving of a new lease, amounted to an election upon the part of the lessors to withdraw the option previously given.

As was said by Judge Brawley of the United States Circuit Court of Appeals, Fourth Circuit, in the case of *Huggins v. Daley*, *supra*:

"In a case like this, no judicial proceeding was necessary to avoid the lease. The landlord, never having been out of possession, can not re-enter upon himself; and it was held in *Guffey v. Hukill*, 34 W. Va., 49, 11 S. E. Rep., 754, 8 L. R. A., 759, and in many other cases, that any unequivocally expressed election to avoid,—as the giving of a new lease,—avoids the one preceding."

And as was said by the court in the case of *Federal Oil Co. v. Western Oil Co.*, 121 Fed Rep., 674, at pages 677-8:

"The contract here was determined by the act of Bradford refusing to receive the stipulated sum for further delay, and by placing the Western Oil Company in possession."

In answering this proposition in the Circuit Court of Appeals, in their brief, counsel for the petitioners said:

"We are here concerned only with the enforceability of appellee's lease for the period *before* a well is completed. The contention of appellant's counsel (Propositions V and VI) that the completion or tender of completion of a well is a condition precedent can, under the wording of these leases, only relate to the nature of the estate or interest of appellees during the second period, i.e., after the completion of a well. Here these are academic questions, entirely irrelevant to this controversy."

We cannot think that this statement was intended to be taken seriously. To say that after a well has been completed and the lessee has entered upon what counsel are pleased to call the "second period," that is, after the inchoate title has become absolute by performance, that the completion of a well is then a condition precedent to the vesting of a title already vested, is quite paradoxical, to say the least.

Counsel also seem to think that under leases of this kind, the lessee's equities are greater *before* the completion of a well than *after*, while, in fact, the reverse is true. The authorities all hold that leases of this kind vest no present title in the lessee; that until something is done by way of development to claim equitable cognizance, and by which the lessee binds himself to carry out the optional provisions of the lease, it amounts to a mere license, which may be revoked at any time; that the law reads into every lease of this kind a condition that the vesting of any estate depends upon the doing of the things contemplated.

PROPOSITION VII.

Laches.

The lease of the complainants should not be enforced in a court of equity because of the *laches* of the complainants in that they failed to carry out the purpose of the lease, but stood by awaiting the result of development by others, the fruit of whose enterprise, labor and money, they now seek to appropriate.

The leases were executed on the 22nd day of May, 1905. The lessee promised to complete a well within nine months, or thereafter pay at the rate of 25 cents per year, *quarterly in advance*. The time for making this preliminary test expired on February 22nd, 1906, and during

that time no move was made toward carrying out the provisions of the leases. No well was begun, nor was the stipulated penalty paid for the failure to complete a well within the time prescribed. To all appearances, the enterprise was abandoned. After waiting for more than a month from the expiration of this probationary period, with no word from the lessee, and no sign of life upon his part, the land owners executed other leases to one H. E. Wilcox who held similar leases on other lands in the vicinity, and who soon thereafter began the construction of a well on another tract, but near by. This being done, on the 6th day of April, 1906,—although this payment was long past due, Mr. Gillespie, acting for all of the petitioners, placed in the Exchange Bank of Martinsville, Illinois, the so-called "rental," said bank being named in the leases as the place of payment, and then waited results of the Wilcox well. Failing to find oil in this well, the Wilcox leases on these premises were surrendered. (Tr. p. 341.)

Afterward, on the 9th day of August, 1906, no possession having been taken under the Walton leases, and there being no indication of any intention ever to do so, and after the Smiths, by letter and in person had made inquiry at said bank and were informed that no money had been left there on account of said leases, and after inquiry by telephone, Mr. C. E. Allison had been informed by said bank that no such payments had been made, said Smiths executed new leases to said Allison on said premises. These leases with another aggregating in all 90 acres, were purchased by respondents, Hennig, Solley and Johnson in March, 1907, for the sum of \$50,000.00, and under these leases, they made valuable and lasting improvements upon the premises, and by the expenditure of vast sums of money in making development, the leaseholds have been made exceedingly valuable.

Neither Hennig nor his associates had any knowledge of the existence of the Walton leases until they were served with process in these cases from the Circuit Court of Crawford County, Illinois, in which court these cases were originally brought, and at which time there were twelve producing wells upon the premises, constructed at great cost. Thus more than two years had expired since the execution of the Walton leases without a hand being raised toward developing the premises by the holders thereof, during which time they stood by and saw the leaseholds grow in value as if by magic by reason of the labor, skill, energy and enterprise of these respondents, and at tremendous cost.

To one capable of analyzing the conduct of men and their motives, it must be plain that the making of the deposit of the so-called "rental" in bank was inspired by the development then being made in the vicinity by Wilcox, and that the purpose of the quiescence upon the part of the petitioners was to have the premises tested and developed at the cost, labor and risk of others, which they were unwilling to hazard.

The conduct which will amount to such laches as will prevent the granting of relief in equity, depends upon the subject-matter and circumstances of the particular case. Where the property involved is speculative in character and subject to rapid fluctuations in value, great promptness is required. And more especially is this true, where the rights of third persons may intervene.

In the case of *Huggins v. Daley*, 99 Fed. Rep., 606, from which we have previously quoted, the court says:

"There is, perhaps, no other business in which prompt performance is so essential to the rights of the parties, or delays so likely to prove injurious,—no other class of contracts in which time is so much of the essence. There is no other branch of mining

where greater damage is done by delay. Coal and precious metals lie either in horizontal veins or in pockets. They remain where they are until removed. Oil and gas are the most uncertain, fluctuating, volatile and fugitive of all mining properties. They lie far below the surface, beyond the control of human will, whence they may flow unrestrained, if the owner of adjoining land bores a well down to the strata which holds them; and there is no law which can provide adequate, if indeed any, compensation for such results. This is a matter of common knowledge, and courts will generally take notice of whatever ought to be generally known within the limits of their jurisdiction."

Applicable to this phase of these cases is the text of the *Cyclopedia of Law and Procedure*, Vol. 16, page 161, supported by numerous authorities there cited:

"The speculative character of the property involved is an important element in considering the effect of delay in asserting a right thereto, and more than ordinary promptness must be displayed to avoid the charge of *laches* in such case. This is but one phase of a broader principle, that one may withhold his claim, awaiting the outcome of an enterprise, and then, after a decided turn has taken place, assert or renounce his interest in accordance with the result. Accordingly, a marked appreciation or depreciation, according to circumstances, in the value of property involved, when the right might have been asserted before such change, will prevent the granting of relief."

Again on page 162:

"The most frequent case of *laches* consisting of delay working prejudice to the defendant through change in circumstances, is where plaintiff has slept

on his rights and permitted defendant to make valuable improvements on the property in controversy, or to make large expenditures in reliance on his title thereto. This is usually sufficient to bar relief."

And again on page 163:

"Equity is equally careful to avoid injustice to third persons as to parties, and therefore will deny, for *laches* the claim of one who has slept on his rights until the third persons have acquired rights which would be affected by granting him relief."

Applicable also to this contention are the words of Mr. Justice Patterson of the United States Supreme Court, in the case of *Hollingsworth v. Fry*, 4 Dall., 345, as follows:

"In cases of the present kind, equity will not suffer a party to lie by till the event of the experiment shall enable him to make his election with certainty of profits one way, and without loss any way. This mode of procedure is unfair, contrary to natural justice and in exclusion of mutuality."

Applicable also are the words of Mr. Justice Miller in the case of *The Twin-Link Oil Co. v. Marbury*, 91 U. S., 593:

"The fluctuating character and value of this class of property is remarkably illustrated in the history of the production of mineral oil from wells. Property worth thousands today is worth nothing tomorrow; and that which today would sell for \$1,000, as its fair value, may, by the natural changes of a week, or the energy and courage of desperate enterprise in the same time be made to yield that much every day. The injustice, therefore, is obvious of permitting one holding the right to assert an ownership in such property to voluntarily await the event, and then decide, when the danger which is over, has been

at the risk of another, to come in and share the profits.

"While a much longer time might be allowed to assert this right in regard to real estate whose value is fixed, on which no outlay is made for improvement, and but little change in value, the class of property here considered, subject to the most rapid, frequent and violent fluctuations in value of anything known as property, requires prompt action in all who hold an option whether they will share its risk or stand clear of them."

In the case of *Iron Co. v. Trout*, 83 Va., 409, 2 S. E. Rep., 713, in speaking of the forfeiture of a lease for the mining of solid minerals, because of the *laches* of the lessee, the court says:

"The lease was for a term of twenty years. Yet looking to its nature and object, it can not be contended that the lessee had the option to work or not to work the ore mines for an indefinite time, and thus convert what was designed to yield a handsome daily income to the lessor into a mere barren encumbrance on his land—a cloud on his title,—an incubus and a manacle which would oppress him and destroy the market value of his land. No lease of land for rent for a return to the landlord out of the land which passes, can be construed to be intended to enable the tenants to merely hold the lease for the purpose of speculation, without doing and performing in connection therewith what the lease contemplated. *Such a construction would, indeed, make all such contracts a snare for the entrapment and injury of the unwary landlord.*"

In the case of *Venture Oil Co. v. Fretts*, 152 Pa. St., 451, the Supreme Court of Pennsylvania uses this language:

"The agreement of December 20th, 1864, contemplates the production of oil and the return to the lessor of rent or royalty out of the oil produced. It must, therefore, be construed with reference to the known character of the oil business, and the evident intention of the parties. The covenant to commence operations within six months, etc., is not performed by commencing and then indefinitely suspending operations; but operations begun within the time limit must be prosecuted in the manner in which the business is ordinarily conducted, until the search for oil is ended, either by finding it and operating the territory or failing to find it and surrendering the possession."

In the case of *Munroe v. Armstrong*, 96 Pa. St., 307, it was held that a cessation of operation for thirty days terminated the lease. In the opinion, on page 310, the court said:

"An oil lease yields nothing to the land owner when not worked, and is an encumbrance on his land, tying his hands against selling or leasing to others; but when idle, it costs the lessee nothing and is valuable, or may prove valuable, if he can hold it awaiting developments in its vicinity. If a well be productive, it is in the interest of both lessor and lessee that it be continuously operated till its exhaustion, but if dry, it is of no value. Holding on to a lease after ceasing search is often for the purpose of speculation, the thing which a prudent land owner guards against. *Forfeiture for non-development or delay is essential to public and private interests in relation to the use and alienation of property.*"

In the case of *Huggins v. Daley*, *supra*, a delay of eight months was held to be unreasonable.

In the case of *Federal Oil Co. v. Western Oil Co.*,

supra, a delay of eight months was held to be unreasonable.

And in the case of *Cassel v. Crothers*, 193 Pa. St., 359, the shutting down of a well by the lessee "for the winter" terminated the lease.

It will be seen from the foregoing citations, that "oil law" favors the faithful driller and does not sanction the claim of an adventurer who lies by to appropriate the enterprise of another. And while there is much more reason for the rule in cases of this kind because of the character of the property involved—its violent fluctuations in value, the fugitive tendency of these substances rendering them liable to be lost by drainage through wells on other lands, the rule for which we are now contending has been applied by the courts with much vigor where property of a more stable character was involved.

In the case of *Johnson v. Standard Mining Co.*, 148 U. S., 360, a bill in equity to establish an interest in a mining lode, was dismissed upon the ground of *laches*. In the notes preceding the opinion are the following:

"A party will not be permitted to delay to enable him to speculate on a chance of an appreciation in value of property, and elect to proceed only where it would be profitable to do so.

"A person will not be permitted to remain passive, prepared to affirm the transaction if it should be advantageous to him, or repudiate it if unprofitable."

In the opinion, Mr. Justice Brown uses the following language:

"The duty of inquiry was all the more peremptory in this case from the fact that the property of itself was of uncertain character, and was liable, as is most mining property, to suddenly develop an enormous increase in value. This is what actually took place

in this case. A property which, in October, 1880, plaintiff sold to Chatfield upon the basis of \$4,800, for the whole mine, is charged in the bill filed October 21, 1887, to be worth \$1,000,000, exclusive of its accumulated profits. Under such circumstances, where property has been developed by the courage and energy and at the expense of the defendants, courts will look with disfavor upon the claims of those who have lain idle while awaiting the results of this development, and will require not only clear proofs of fraud, but prompt assertion of the plaintiff's rights. • • •

"We think it is clear that the plaintiff did not make use of that diligence which the circumstances of the case called for, and the decree of the court below dismissing his bill, is therefore affirmed."

Quite pertinent to this subject is the text in Am. and Eng. Encyc. of Law (1st Ed.) Vol. 22, p. 1043, as follows:

"Diligence is expected of all who seek equitable relief. One who disregards the rights of others by unnecessary or unreasonable delay in performing his obligation under a contract, thereby loses the right to require performance of the other party. Where time is in any degree an essential element, his *laches* will render a decree in his favor inequitable. Delay either in performing his duty or in bringing suit to enforce his rights will endanger his case and justify a court of equity in refusing to give him a hearing.

" 'It may be laid down as an acknowledged rule in courts of equity,' says Chancellor Kent, 'that where the party who applies for specific performance has omitted to execute his part of the contract by the time appointed for that purpose, without being able to assign any sufficient justification or excuse for his delay; and where there is nothing in the acts

or conduct of the other party that amounts to an acquiescence in that delay, the court will not compel a specific performance.' If, while he has been sleeping on his rights, the interest of third parties has intervened, he will be estopped from claiming a specific performance against them. If he has failed to assert his claim and has permitted innocent purchasers to come into possession and make improvements while he has stood by in silence, he will be deemed to have waived and lost his equitable interest."

In the note under the above, under the topic, "Change of Circumstances," will be found the following:

"One who desires to enforce specific performance of a contract for the purchase of land, must present his claim without any unnecessary delay, and while affairs remain in such a condition that the performance can be enforced without injury to others, and must not have done any act that is incompatible with his claim for performance.—*Porter v. Daugherty*, 25 Pa. St., 405."

"For, if while he is delaying in the fulfillment of his obligation, the value of the property or the circumstances of the parties have changed so that it may prove unfair to others to compel the performance, it will not be enforced."—Citing many authorities, among which are: *Mundy v. Davis*, 20 Fed. Rep., 355; *McKay v. Corrington*, 1 McLean (U. S.) 50; *Brashier v. Gratz*, 6 Wheat. (U. S.) 528; *Holgate v. Eaton*, 116 U. S., 33; *Shortall v. Mitchell*, 57 Ill., 161; *Young v. Daniels*, 2 Iowa, 126, 63 Am. Dec., 477; *Green v. Covilland*, 10 Cal., 317, 70 Am. Dec., 725.

"Time is frequently considered not of the essence of an agreement to convey lands; but in all cases where the value of the property has materially changed, or where great financial changes have mater-

ially altered the relative value of money or land, time will be considered material, and a party will not be allowed to lie by until the change sets in his favor, and then ask specific performance.—*Merritt v. Brown*, 19 N. J. Eq., 286."

"Specific performance of an agreement to convey land by warranty deed, will be refused if there has been a delay of six months, when the value was rapidly increasing.—*Chicago, etc. Co. v. Stewart*, 19 Fed. Rep., 5."

Under the circumstances of this case, and in view of the character of the property involved, upon the authorities as well as upon reason, it seems clear that because of the *laches* of the complainants a court of equity should refuse to reward the designed indolence of the complainants, at the expense of the defendants through whose courage, energy, industry and enterprise and at whose cost of much labor and money this property has been made exceedingly valuable. To grant the relief prayed for, in the light of all the facts and circumstances of the case, would be unconscionable and shocking to every sense of right and justice.

In their brief in the court below, counsel for the petitioners catalogued, chronologically, the acts done by the petitioners in relation to the leases in controversy. It is significant that of all the things thus enumerated, there is not to be found a single act required to be done by the contracts, or even tending toward the development of the premises, or in carrying out the object for which the leases were given or an offer to do so. On the contrary, when analyzed, they show a purpose not to do so. The very first act, indicating any sign of life upon the part of the petitioners was the depositing in the Bank at Martinsville, Illinois, for Susannah Smith \$22.50, the

so-called "delay rental." This was done long after the expiration of the probationary nine months period for the completion of a well, and after this "rental" was long past due, and not until after the premises had been leased a second time to H. E. Wilcox, who was at that time developing other land in the vicinity.

In further attempting to excuse the *laches* of the petitioners, counsel say that "it is found to be a practical necessity to await the construction of pipe lines into the territory before undertaking extensive operations."

Here is another presentation of the much-discussed problem of the hen and the egg,—which came first? It is a matter of common knowledge that a pipe line never precedes development. Indeed, the testimony of Mr. Gillespie in these cases shows this fact. On page 266 of the transcript appears the following:

Q. At the time you got these leases, there was no pipe line down there?

A. Not that I know of.

Q. Did you ever know of a pipe line being laid into a community until there were some wells and some production there to lay to?

A. No sir.

Q. Did you expect a pipe line to be built there without production?

A. No, I didn't suppose they would.

Thus it appears that this excuse vanishes in "thin air." If the petitioners were waiting for a pipe line to be built into that vicinity, before making development, they were waiting for others to make the development which always precedes the pipe line.

It is also a matter of common knowledge, that when the presence of oil is demonstrated, the pipe line quickly follows. It is quite plain from the record in these cases

that those who developed these premises in good faith had no difficulty in finding a market for the oil.

Further in their brief, counsel say:

"In view of these facts, no obligation had arisen on the part of appellees to *protect* the Smith property by drilling the lines of the adjoining farms. No question is raised in the case of any lack of diligence in drilling on account of development of adjoining premises."

The leases, themselves, contemplate diligence. They were given "for the sole and only purpose of *mining and operating* for oil and gas," and nine months were given in which to complete the initial well. Under leases of this character, can it be said that there is no obligation resting upon the *lessee* to carry out the purpose of the lease until some one with greater enterprise has carried development to the lines of the leased premises? If this be true, development could be delayed indefinitely, or forever.

But even upon the theory advanced, the evidence does show such development in the vicinity as to require, at least some diligence upon the part of those holding the oil and gas rights upon these premises, while none, whatever, was shown upon the part of the petitioners.

When Wilcox obtained his lease on the premises in the spring of 1906, the development showed this property to be in what was known as the Bellair Pool. (Tr. p. 342 et seq.)

In June of that year, (1906) there was at least a well in process of construction on the adjoining land, and upon which the notice was posted. (Tr. pp. 192-3, 205.)

When Mr. Hennig was negotiating for these leases in the spring of 1907 he owned leases on 700 acres of land surrounding the Smith land which he had procured a year previous, and upon which he had been operating. (Tr. p. 399.)

Little & Willett, in the fall of 1906, had constructed a number of wells on the adjoining land of John Payne, and of Elzora Smith; and had constructed a power-house and tanks on the line between the land in controversy and the land of Elzora Smith, for the purpose of operating wells on both tracts of land, and also on the Payne land. (Tr. p. 381 and p. 385.)

The testimony of Mr. Wilcox shows that there were a number of wells completed on adjacent lands before any well was completed on the Smith land by anybody. (Tr. p. 344.) In relation to the development in that vicinity Mr. Wilcox said: "When this was opened up in there close to the Smiths, why, it was, you might say, a pool within itself, right in that neighborhood at that time and it caused a great deal of discussion. People talked about it every place, of course, all over the country, and every place you would hear something about it, that is, generally all through the oil business." (Tr. p. 342.)

In the light of these developments, it is preposterous for the petitioners to say that they were under no obligation to develop these premises on which they held a lease given for that express purpose, and excuse themselves for their failure to perform their plain duty in this respect by saying that they were "not ready to drill."

If the decision in the case of *Huggins v. Daley*, 99 Fed. Rep., 606, in which so many of the questions involved in these cases were covered by the general questions of law announced, was governed by the fact, as counsel say, "that operations on adjacent lands threatened irreparable injury to the lessor and justified his giving a subsequent lease," the facts disclosed by the evidence would bring these cases within that rule. And, while it is true that in that case the development on adjoining land was considered by the court, the principles of "oil law" there

announced are general, and apply to all leases of this character independent of the facts involved. These principles are clearly stated in a single paragraph of that decision:

"While most of the cases cited have gone on the ground of abandonment, the governing principles in all oil leases of the character under consideration is that discovery and production of oil is a condition precedent to the continuance or vesting of any estate in the demised premises; that such lease vests no present title in the lessee, and, if, at any time, the lessee has the option to suspend operations, the lease is no longer binding on the lessor for want of mutuality; and where the only consideration is the prospective royalties to come from exploration and development, failure to explore and develop renders the agreement a mere *nudum pactum* and works a forfeiture of the lease, for it is of the very essence of the contract that work should be done."

PROPOSITION VIII.

Oil and Gas as Property.

Oil and gas *in situ* are not capable of private ownership, but they become "property" only when reduced to possession. Title to these substances is inchoate and contingent upon their discovery and production. Leases of this character, therefore, vest in the lessee no present title to the oil and gas, but are a mere license to explore for, and, if found, to reduce the same to possession.

By the decree in this case, the complainants are to receive pay for the oil produced from the premises in controversy by the defendants. Not only so, but it also declares that the defendants are not entitled to credit for the cost of producing the oil, nor for the value of the

improvements placed upon the premises. In other words, the decree not only gives to the complainants the leasehold in question in its improved condition, together with the permanent improvements placed thereon by the defendants, but it also gives to them the value of the oil without charging them with the cost of producing it. Upon what equitable principle this conclusion was reached, we are unable to see.

In discussing this phase of this case, the question of the validity or enforceability of the lease will not be considered. If the lease is invalid or non-enforceable, then, of course, the granting of this relief was erroneous. For our present purpose, we will assume that the lease is valid and such as will be enforced in a court of equity as against the respondents. With this assumption, it is pertinent to inquire, to whom did this oil belong? If it did not belong to the petitioners, they, of course, should not receive pay for it. That it did not belong to the petitioners, there can be no doubt, for at least two very cogent reasons:

First. The oil in place, is not such property as is capable of ownership, and even if the owner of the land had assumed to convey it to the lessee, no title to it would pass.

Second. The leases in question do not even purport to grant the oil and gas in and under the premises. Then, should a court give the petitioners more than they bargained for? If so, why?

Oil in Place is not "Property."

The court judicially knows the character of oil and gas. It knows that these substances are highly volatile, and, unlike solid minerals, have no fixed *situs*, but are fugitive and migratory. That they are found far beneath the surface of the earth in porous rock or in veins, tense

by reason of their own volatility, or the pressure of the super-incumbent rock, ready to escape through the avenue of least resistance. If a well be sunk to the strata which holds them, they are obtained, but from whence they come, no one can tell.

The oil and gas under a given area today may be miles away tomorrow. The oil and gas under my land now, may be flowing from my neighbor's well within an hour hence. I sit down to make a deed purporting to convey these elusive fluid-minerals to another, but before the instrument is executed, the oil and gas which I assume to sell, have passed through a well on adjoining land, and are rushing through a pipe line to another market. Thus it will be seen, that because of the character of these substances, *until they are reduced to possession*, they are incapable of ownership, and, of course, can not be conveyed.

By virtue of his proprietorship, the owner of the land may sink a well upon his premises, and if he tap the vein which holds them, he may reduce these substances to possession, in which event, they become his, not as a part of the land, but as personal property, and his title becomes vested because he was the first taker. The owner of the land controls the means by which these substances may be reached, or reduced to possession, because he has dominion over the surface of his land. He may convey to another the use of his land for the purpose of capturing the oil and gas whereby they become property, and belong to him who reduces them to possession.

In the same way, the owner of land may take fish from a stream or game from a forest upon his premises, and they become his, not because he owns the land, but because he became the first taker. He may grant to another the privilege of fishing in his stream or hunting

in his forest, and the fish or game thus taken become property and belong to him who captures them.

So, too, may the owner of land, use the air and sunshine over his premises, and they are his, not because they are a part of the land, but because he appropriates them to his use. Could he, by deed, pass title to another to this air and sunshine? He may, however, convey to another the right to use the air and sunshine upon his premises. One desiring to engage in any business in which these elements may be used, such as the drying of fruits and vegetables, may acquire the right to erect upon the premises of another such sheds, structures and appliances as will enable him to utilize the air and sunshine in his business, and they become his, not by grant or demise, but because he appropriates them to his use.

In the same sense, the owner of the land may give a license to another to explore for oil and gas upon his premises, and to erect thereon buildings, and structures and to lay pipes for the production and transportation thereof, but he can convey no more title to these substances while in the earth, than he can convey title to the fish in his stream, the game in his forest or the air or sunshine which float over his premises.

The authorities are numerous upon this subject. But we cannot refer to any considerable number of them without unduly extending this argument. We will therefore be content to notice only a few, and invite the attention of the court to the numerous authorities which we have cited under this head in the preceding brief.

The case of *Wood County Petroleum Co. v. W. Va. Transportation Co.*, 28 W. Va., 210, 57 Am. Rep., 659, 660, is a remarkably well considered case and sheds a flood of light upon the question under consideration.

In that case, a landlord leased premises for the express and sole purpose of mining and taking carbon oil

therefrom at a fixed royalty. The tenant opened a well which produced both oil and natural gas, the latter in large quantities, issuing by its own force from the well. The tenant separated the gas from the oil, and by pipes conducted it beyond the leased premises where he sold or appropriated it to his own use. The owner of the land brought an action against the tenant to recover the value of the gas thus taken and in the lower court was successful. In the Supreme Court, the question of natural gas as *property* was carefully considered and that court held that the tenant was not accountable to the landlord for the gas or its value. In course of the opinion, the court says:

“While the grant is for the specific purpose of mining for and removing carbon oil and for none other, still there are necessarily included in this grant all the incidents essentially or naturally pertaining to its enjoyment. Included in these are the elements, such as light, air and water. And having the legal right to enter upon and occupy any portion of the premises, the appellant could, without becoming a trespasser or incurring any liability to the lessor, use and appropriate anything it might find thereon, which is not the property of another, such as animals *ferae naturae*, or waters percolating through the land, even though by such use and appropriation it may deprive another, having an equal right, of the power to do so. These are not subjects of absolute property, and being therefore *jure naturae*, capable of a qualified ownership only, they belong to him who first appropriates them. (*Citing authorities.*)

“If the hydro-carbon or natural gas now in controversy belongs to the class of things which are incapable of being absolute property, but are the subjects of qualified property only, such as those above

mentioned, then it is clear this gas was not the property of the plaintiff, and the appellant is not liable for its use and appropriation; but, if on the other hand, said gas is susceptible of absolute ownership, then it is a part of the realty of the plaintiff, to which the appellant acquired no right under said lease, and is therefore liable to the plaintiff for the value of the same. The important and decisive inquiry in this case is, therefore: To which category does hydrocarbon gas belong?"

After reviewing the history of natural gas, in reasoning upon the above self-propounded question, the court says:

"It is apparent from the history of the nature and properties of natural gas, that it partakes more nearly of the character of the elements, air and water, than it does of those things which are the subject of absolute property. It is more volatile than air, and when tapped in the earth it escapes more readily. When the supply is withdrawn from one place, it flows of its own accord from other points and replaces that which has been withdrawn. What distance and from what source it comes, is the subject of conjecture only. The well or means of escape may be on one farm or in one county, and the reservoir or source of supply may be under other farms or in other counties more or less distant. Like water percolating beneath the surface, it may, by sinking a well or otherwise, be appropriated for the use of one person on his farm, while the supply may come from an adjoining or from many distant farms. The right of appropriation is so absolute in the case of water flowing underground, that if the owner of land in digging a well or cellar or working a mine on his own premises cuts off the water, which by perocla-

tion supplies his neighbor's well and thereby diverts it to his own, or drains the well of his neighbor, the latter is without remedy; it is *damnum absque injuria*, if not negligently or maliciously done. (*Citing authorities.*)

"It is not disputed that both air and water are the subjects of qualified property by occupancy. Every owner of land has the control of the use and appropriation of the air and water on his land, but this control can be asserted only by denying access to the land, and not by demanding compensation from those who are in the rightful occupancy of the land. And, having the right to exclude others from his land, the owner may, by contract, provide that those who desire the air or mineral or other waters on his land, shall pay him a stipulated price for the same, and such a contract would be enforceable in law. But in such case the contract must be express, because the ownership is qualified, and the law will not raise an implication for the payment of such property. These being incapable of absolute ownership, they can not be the subject of compensation for waste or appropriation where the access is rightful, and where it is wrongful, the measure of damages will be limited to the injury done to the land.

"By analogy, therefore, it seems to me, the rule and principles which pertain to air and water and other subjects of the same nature, must be applied to the natural or hydro-carbon gas involved in this suit."

It has often been held that a land owner may drill a well near to the land of an adjacent owner, and draw out the oil and gas from under the latter's land, without liability. And he may shoot the well with nitro-glycerine and then use pumps in order to more readily extract the

oil from his neighbor's land, without liability to such neighbor.—*Kelly v. Ohio Oil Co.*, (Ohio) 39 L. R. A., 765; *Jones v. Forest Oil Co.*, 194 Pa. St., 379, 48 L. R. A., 748; *Simpson v. Pitt. etc. Ry. Co.*, 28 Ind. App., 334, 352.

In the case of *State of Indiana v. The Ohio Oil Co.*, 150 Ind., 21, the State of Indiana brought an action against The Ohio Oil Company to enjoin it from wasting gas by allowing it to escape in the open air in violation of a statute of that state to prevent such waste of gas. The action was resisted upon the ground that the defendant was the owner of the gas, and that the statute was unconstitutional in that it amounted to a taking of property without due process of law. In the course of the opinion, the court used this language:

"To say that the title to natural gas vests in the owner of the land in or under which it exists today, and that tomorrow, having passed into or under the land of an adjoining owner, it thereby becomes his property, is no less absurd and contrary to all analogies of the law than to say that wild animals or fowls in their fugitive and wandering existence, in passing over the land become the property of the owner of such land or that fish, in their passage up or down a stream of water become the property of each successive owner over whose land the stream passes. It is as unreasonable and untenable as to say that the air and sunshine which float over the owner's land is a part of the land, and is the property of the owner of the land. We therefore hold that the title to natural gas does not vest in any private owner until it is reduced to actual possession, and therefore the act from which we have quoted is not violative of the constitution, as an unwarranted interference with private property."

The above case was taken to the Supreme Court of

the United States where it was affirmed, the opinion appearing in 177 U. S., 190. In the course of the opinion by Mr. Justice White, the following language is used:

"Although, in virtue of his proprietorship, the owner of the surface may bore wells for the purpose of extracting natural gas and petroleum oil, until these substances are actually reduced to possession, he has no title to them whatever as owner. That is, he has the exclusive right on his own land to seek to acquire them, but they do not become his property until the effort has resulted in dominion and control by actual possession."

The case of *Townsend v. State*, 147 Ind., 624, was a criminal action brought against the defendant for an alleged wasteful use of natural gas in what are known as "flambeau lights" in violation of a statute of the State of Indiana, making it unlawful to so use natural gas. The defendant was convicted below and on appeal to the Supreme Court, the constitutionality of the statute was assailed upon the ground that to deny the defendant the right to so use gas from his own well upon his own premises for the purpose of illumination, was a taking of property without due process of law. But the judgment below was affirmed and in the opinion the court classed natural gas with animals *ferae naturae*.

In *Venture Oil Co. v. Fretts*, 152 Pa. St., 451, the Supreme Court of Pennsylvania upon this subject, said:

"An oil lease stands on quite different grounds from leases for mining of solid minerals—the title is inchoate and for the purpose of exploration only until oil or gas is found. If not found, *no estate vests in the lessee*."

In *Huggins v. Daley*, 99 Fed. Rep., 606, the court said:

"The governing principle of all oil leases is that the *discovery and production of oil* is a condition precedent to the continuance or vesting of any estate in the demised premises. *Such lease vests no present title in the lessee.*"

In *Federal Oil Co. v. Western Oil Co.*, 112 Fed. Rep., 373, the court said:

"Leases of coal, stone and other like materials are corporeal hereditaments, and constitute an essential part of the land itself, and are capable of present, absolute grant, while oil and gas are of a fugitive and volatile nature, a grant of either of which creates only an inchoate right, which will become absolute only upon its reduction to possession.

"A lease to mine for oil and gas is a mere incorporeal right, to be exercised in the land of another. It is a *profit a prendre*, which may be held separate and apart from the land itself. * * * The legal effect of the instrument is, therefore, *a grant of a mere use for prospecting*. The title is inchoate and for the purpose of exploration only until oil is found."

In *Foster v. Elk Fork Oil Co.*, 90 Fed. Rep., 178, the court said:

"The former (oil leases) in their primary effect, part with no immediate title or estate and carry but a right of exploration, any title or estate which may be contemplated remaining inchoate and of no effect until oil or gas is found."

In the case of *Federal Oil Co. v. Western Oil Co.*, 121 Fed. Rep., 674, the United States Circuit Court of Appeals, Seventh Circuit, by Judges Jenkins and Grosscup, says:

"The legal effect of the instrument here in question is therefore the grant of a mere use for the pur-

pose of prospecting. The title is inchoate and for the purpose of exploration only until oil or gas is found. If not found, no estate vests in the lessee, and his title, whatever it is, ends with the abandonment of the unsuccessful search. If found, the right to produce becomes a vested right, and the lessee will be protected in exercising it in accordance with the terms and conditions of the contract.—*Heal v. Niagara Oil Co.*, 150 Ind., 483; *Venture Oil Co. v. Fretts*, 152 Pa. St., 451."

The Supreme Court of Illinois has announced the same rule. In the case of *Poe v. Ulry*, 233 Ill., 56, it was held:

"A grant of oil and gas on certain land is a grant of such oil and gas as the grantee may find there, and he is not vested with any estate in the oil or gas until it is actually found, since on account of their wandering nature and their liability to escape, or be withdrawn to other lands, they are not subject to absolute ownership."

In the case of *Watford Oil and Gas Co. v. Shipman*, 233 Ill., 9, the court held:

"Oil and gas, while in the earth, unlike solid minerals, are not the subject of ownership distinct from the soil, and a grant of the oil and gas, therefore, is a grant, not of the oil that is in the ground, but of such part thereof as the grantee may find, and passes nothing which can be the subject of an ejectment or other real action."

Under other topics previously discussed in this argument, we have quoted from many authorities in which the same rule was incidentally stated, and in the economy of time we will not re-quote them here, but invite the attention of the court to the authorities cited by us under proposition VIII, in the brief preceeding this argument.

From the foregoing it must be clear that because of their volatile character, and their consequent fugitive and migratory habit, oil and gas, in place are not capable of private ownership; that because of this fact, until reduced to possession, they can not be granted or conveyed. For this reason, if for no other, the complainants could not become the owners of the oil in question, even if the lease purported to convey it to them.

But the lease does not purport to convey any oil or gas in place. It was given "*for the sole and only purpose of mining and operating for oil and gas and of laying pipe lines,*" etc. The lessee could become owner of the oil and gas only by availing himself of the privilege accorded by the lease,—by reducing these substances to possession.

If it were conceded that the complainants were deprived of that which they acquired under their lease, they then were deprived merely of the privilege of operating, because this is the only thing that was granted by the lease. There was no evidence that they were prevented from operating. On the contrary, the evidence shows that they had no desire to operate on the premises, or had any intention ever to do so. They showed no sign of life until after the presence of oil was demonstrated, and then not by evincing any desire or intention of operating upon the premises, but on the contrary, the only effort ever put forth upon their part was to prevent such operation. And the only reason they can give for not operating on the premises is that *they were not ready to do so*. They were not deprived of anything they acquired by their lease, even if it were valid and enforceable. Upon what principle, then, equitable or otherwise, can it be said that the complainants are entitled to receive pay for this oil which was produced by these respondents,—oil which never became theirs by purchase, gift, inheritance

or discovery or by any other method by which title to property may be lawfully acquired?

PROPOSITION IX.

The Measure of Damages in Actions at Law.

If the oil and gas in place, like solid minerals, were capable of ownership, and if it were conceded that the leases in question conveyed to the complainants title to the oil and gas *in situ*, the measure of damages, in an action at law for their conversion, would be the value of these substances *in place*, and not the amount for which they were sold, unless the trespass was wilful or malicious.

If oil and gas, in place, like solid minerals, were capable of private ownership, and if the leases in question were deeds whereby these substances were conveyed to the complainants, even then, the provision of the Decree as to the measure of damages would be erroneous.

We are not unmindful of the rule in an action at law for damages resulting from a trespass, that where minerals have been fraudulently taken from mines, or where timber has in like manner been taken from a forest and converted, the wrongdoer will not be allowed credit for the cost of accomplishing such conversion.

This rule grew out of, and is intended to prevent, the fraudulent practice, in working subterranean mines, where the fraud is difficult of detection, of going beyond the boundary of the mine and extracting valuable minerals from an adjoining lode or vein. The rule has also been applied to the furtive taking of timber from forest reservations and timber tracts not under surveillance. Such instances are accompanied by a fraudulent intent—a species of larceny. In such cases, where an injury has been done,—when the property has been reduced in value,

not only will the injured party be fully compensated for the actual loss sustained, but punitive damages will be allowed by way of retribution as punishment for the wrong committed.

But where the trespass is the result of inadvertence or mistake, the amount of recovery is limited to compensation for the injury done. The rule is tersely stated by the court in the case of *United States v. Homestake Min. Co.*, 117 Fed. Rep., 481, in these words:

"The measure of damages for the reckless, willful or intentional taking of ore or timber from the land of another without right, is the enhanced value of the ore or timber when it is finally converted to the use of the trespasser. But the limit of the liability for damages of one who takes ore or timber from the land of another without right through inadvertence or mistake, or in the honest belief that he is acting within his legal rights, is the value of the ore in the mine or the value of the timber in the trees."

The above action was for the conversion of lumber and cord wood cut and removed from the Black Hills forest reservation of the United States, and used by the defendant company in conducting its mining operations. It was charged in the complaint that the defendant, "without any permit from the Secretary of the Interior, or without any authority at all," willfully cut and removed from the Black Hills forest reservation in South Dakota, pine trees and wood, which it manufactured into lumber and cord wood which it converted to its own use. The defendant answered by denying the willful cutting of the trees and alleged that the timber was taken by permission and authority of the Secretary of the Interior. At the trial there was a stipulation that the value of the timber taken, in the tree, was \$1,757.75, and the evidence showed that the manufactured lumber and cord wood was worth

\$10,451.06, when the defendant used them. Thereupon the court instructed the jury to return a verdict against the defendant for \$1,757.75 and judgment was rendered accordingly. This judgment was assailed by the Government on the ground that the measure of damages was the value of the timber manufactured into lumber and cord wood, and not the value of the timber in the trees. On appeal to the Circuit Court of Appeals, that court, in the course of its opinion, used this language:

"Concede that the attempted sale of this timber to the defendant by the secretary in January, 1908, was not only unauthorized, but in violation of the Acts of Congress and the rules promulgated thereunder, and that presumption is that every man knows the law. This presumption prevails everywhere, and like the similar presumption that every man intends the natural and ordinary effect of his acts, applies to every trespasser. If either or both of these presumptions make every trespasser a willful and intentional wrongdoer, because he is chargeable with knowledge of the law, then there never has been and never can be, a trespasser through inadvertence or mistake, or one who violates the law in the honest belief that he is acting within his legal rights. • • •

"The question, then is, did the trespasser violate the law, which he constructively knew, recklessly or with an actual intention to do so, and to take an unconscionable advantage of his victim, or did he violate it inadvertently, unintentionally, or in the honest belief that he was exercising his own right? If the former, he was a willful trespasser, and the value of the manufactured timber or the extracted ore measures his liability. If the latter, he was an innocent trespasser, and the value of the wood in the tree or of the ore in the mine is the limit of his indebted-

ness. The test to determine whether one was a willful or an innocent trespasser is not his violation of the law in the light of the maxim that every man knows the law, but his honest belief, and his actual intention at the time he committed the trespass; and neither a justification of the acts nor any other complete defense to them is essential to this proof that he who committed them was not a willful trespasser."

In the case of *Montrozona Gold Min. Co. et al. v. Thatcher*, (Col.) 75 Pac. Rep., 595, a lease of a certain mining claim was given, one of the conditions of which was that the lessee should sink a shaft to a specified depth before the first day of January, 1901. Work was begun under this lease, but the shaft was not sunk to the required depth by the time specified. Written notice of forfeiture was served on the lessee on the 4th day of January, 1901, for failure to sink said shaft to the required depth. The lessee did not heed the notice of forfeiture, but continued work and thereafter took out ore. Suit was brought to recover the value of the ore after it was brought out of the mine. The defendant contended that time was not of the essence of the contract and failure to have the shaft completed to the designated depth by the time stated did not terminate the lease. The court held otherwise. In regard to the measure of damages for the ore taken after notice of forfeiture, the court said:

"Lessees of a mine who continue to mine it after notice of forfeiture for failure to sink the shaft a certain number of feet by a certain day, are not willful trespassers, though mistaken in their contention that there was not a forfeiture; so that on an accounting for ore, they should be allowed for the expense in mining it."

It will be noted that in the above case, the mistake was not one of fact. The lessee proceeded with full knowl-

edge of the claim of the owner of the mine that the lease was forfeited, and over his protest. The mistake was purely one of law, which every man is presumed to know, yet, it being an honest mistake, he was allowed credit for expenses incurred.

In the case of *Ruffner v. Lewis*, 7 Leigh, 720, 30 Am. Dec., 513, the defendant, under belief that he had a good title, which proved to be defective, expended large sums of money in sinking wells and erecting machinery and appliances for the manufacture of salt. Much of the effort was fruitless, but in an action by one having a superior title, the defendant was not only allowed credit for the value of the improvements which he placed upon the premises, but also for the cost of unsuccessful experiments. In the opinion, at page 523, the court said:

“Secondly, as to the improvements: I am clearly of the opinion that the defendants were not only fairly entitled to credit for their expenses and actual service in the successful operation which terminated in rendering the property of great value, but also for their expenses, labor, and services in their unsuccessful experiments. The plaintiffs, if they will have advantage from their successes, must be content to share in their disappointments and failures. He who takes the profits must share the burden. Their works were prosecuted under the impression that the property was their own. Their *bona fides*, therefore, can not be doubted. They can not be suspected of reckless expenditure, or of wild and extravagant adventures. They appear to have been as prudent and sagacious, as zealous and persevering. The plaintiffs are now to have the benefit of the labors of their lives, the fruits of their sagacity, and the harvest of their untiring energy and perseverance. They can not therefore reasonably object to share in their out-

lay. For many a sleepless night and anxious day the defendants must still expect to go unpaid, for these admit of no estimate. But what they have expended in *bona fide* pursuit of their great and meritorious object, ought to be unstintingly repaid. In taking this account, the expenditure of each year should be offset against the rents and profits; and thus we may approximate, at least, to justice between the parties."

Many cases of this character have been before the courts, but those above cited are sufficient to show the established rule in *actions at law*. What is the rule in *equity*?

PROPOSITION X.

The Rule in Equity.

Where one having a superior title goes into a court of equity to assert his right to property, even as against a wilful wrongdoer, he is required to do equity by paying for improvements placed upon the property. And if he seek an accounting for rents and profits, he must bear the cost of production.

In the case of *Butler v. Butler*, 164 Ill., 171, the defendant was a willful wrongdoer, having perverted funds in his hands as trustee in the purchase of land from which he took a large quantity of coal. And yet, a court of equity reimbursed him for improvements made. In the opinion the Supreme Court of Illinois said:

"Besides this, reimbursements for improvements made upon the land of others, through confidence in a defective title will not be allowed except where the true owners are compelled to come into court and seek relief in equity, and here it is appellant, and not appellee, that brought the suit and the latter are asking no relief."

In the case of *Kinney v. Knoble*, 51 Ill., 112, one

Morrison had purchased a large tract of land worth \$35,000, or more, under a small execution against deceased which was done under an arrangement with the executor and creditors in order to avoid the necessity of applying to the court for an order of sale to pay debts. The sale was held to be void. But as a condition to the cancellation, the heirs were required to refund the purchase money with interest, all taxes paid, and pay for all improvements that had been made upon the land.

In the case of *Ebelmesser v. Ebelmesser*, 99 Ill., 540, an administrator of an estate sold land belonging to the estate, and through an agent purchased this land. After improvements were made upon the land, the sale was set aside, and the lower court refused to allow the administrator for such improvements. For this reason the Supreme Court reversed the lower court, and also held that the lower court erred in not taking an accounting between the purchaser and the owner.

In the case of *Williams v. Vanderbilt*, 145 Ill., 238, the court, on page 251, said:

"In equity, where one makes improvements innocently or through mistake upon the lands of another, he will not ordinarily be allowed to enforce a claim for reimbursement, *as an actor*; but where the true owner seeks relief in equity, as, for instance, to set aside the sale of the land on which the improvements have been made, or to obtain an accounting for rents and profits, he may be required to make compensation for the improvements upon the principle that he who seeks equity must do equity."

In the case of *Lagger v. Mut. Union Loan Association*, 146 Ill., 297, the court said:

"The rule that the purchaser of a defective title is not entitled to compensation for improvements, is

relaxed in favor of such purchaser when he is brought into a court of equity as a defendant at the suit of the real owner. If the latter seeks the aid of equity to establish his right to the property itself, and it appears that the estate has been substantially benefited by the improvement, it would seem to be just that he should be required to make compensation."

Tested by whatever rule, it must be clear that if it were conceded that the petitioners were the owners of the oil in the earth before it was reduced to possession, the Decree giving them the leasehold in its improved condition and giving to them also the value of the oil produced from the premises by the respondents without allowing credit for the cost of the improvements and of the cost of producing the oil, is so palpably erroneous as to violently shock one's sense of justice.

We are in a court of equity where even-handed justice is administered without fear or favor. If the Decree be affirmed, the petitioners will be given more than they bargained for. Under their lease, if valid, they acquired a mere right or license to develop the premises and if found, to produce oil therefrom. If they had seen fit to avail themselves of the privilege accorded them under their lease, they would have been required to bear the expenses of development and production before they could have realized anything from the sale of the oil. But they did not avail themselves of the privilege. They were not willing to assume the risk of even the cost of the initial well. They stood by and saw these respondents, with splendid courage, pluck and energy, engage in this enterprise; saw them in good faith expend \$50,000.00 in the purchase of these leaseholds, and an additional sum of \$31,404.64 in developing the premises, while the sum total of the petitioners' investment was but Eleven Dollars.

By the Decree, not only are these leaseholds thus

enhanced in value by the labor, skill, enterprise and splendid courage of the respondents turned over to the petitioners, but likewise the improvements, placed thereon at great cost, without which not a barrel of oil could have been produced by anyone. Not only so, but the oil which never belonged to the petitioners, and which they did not know was in existence when they obtained their lease, and which probably was under areas miles away and might have been taken through wells on other lands, were it not for the efforts of the respondents, is also turned over to the petitioners, without even the cost of production. If this be equity, then equity inflicts a penalty—punishes enterprise, and rewards dereliction.

PROPOSITION XI.

Interest.

It was error to charge interest on the respective amounts the defendants were decreed to pay the complainants, from the 10th day of August, 1910.

The Decree gives to the petitioners the premises marvelously enhanced in value by reason of the development made and the operation carried on by these respondents, at a cost of approximately \$31,500, in addition to the purchase price and the labor, skill and energy necessary to the success of this great enterprise, without which the premises would have remained unproductive. For all this, the respondents received no credit. They are also required to pay over to the petitioners the money which they received from the sale of oil which they produced, most of which went into the very improvements which are also given to the petitioners. Thus the petitioners receive practically two fold the value of the proceeds of the premises in addition to the enhancement in value by reason of devel-

opment made, and without the risk and effort which was necessary in making this development.

Not only so, but in order to make the irony complete, the respondents are required to pay the petitioners interest on their own money which they have so invested in the property which is thus turned over to the petitioners! This is a modern brand of equity of which even Shylock never dreamed, and compared with which, his demand for the "pound of flesh" was just and reasonable. And the Decree further solemnly declares that from the *hour of midnight* (a very suggestive hour) of August 10th, 1911, these respondents shall further account to the petitioners for every barrel of oil produced, without any recompense for the cost of producing it, with, of course, interest from that auspicious hour!

We have not been advised by the petitioners upon what rule of law or equity they hope to justify this recovery, and we confess we know of none. Until, therefore, we are advised upon what theory this interest was awarded to the petitioners on money which was never theirs and which was invested in property, which is likewise given to them, we are unable to meet it, and will be content with the statement of the fact that such is a provision of the Decree, and feel that the statement of the fact alone is sufficient within itself to condemn it without further comment.

PROPOSITION XII.

Judicial Comity.

When the nature of "property" in natural gas and oil contained in the earth, and the legal effect of instruments of the character of those here involved have been settled authoritatively by the rulings of the highest court of the State in which they have their *situs*, such decisions establish rules of property peculiar to mining in

that State, which the Federal Courts will recognize and follow.

The importance of the principle embraced in the above proposition must appeal with tremendous force to every thoughtful mind when considering its application to our complex system of jurisprudence.

Aside from its relation to the cases at bar and the part it may have in their determination, the gravity of the subject, in general, and the far-reaching effect it may have upon the tranquility of the Nation, may at least excuse, if not warrant, an elaboration of this subject beyond the prescribed limits of strict application to the cases now under consideration. And if in this we may in any degree contribute to a correct solution of this important question, we will be amply rewarded for our effort.

As Applied Between States.

Not infrequently does it happen that actions are brought in a State based upon a contract or transaction having its *situs* in another State. With a few sporadic exceptions not consistently followed in the jurisdictions where they occurred, it is the universal rule for the court of the State in which the action is brought, if it determines that the contract or transaction in question had its *situs* in another State, and is properly governed by its laws, to determine the substantive rights of the parties, not according to the precedents of the forum, but as nearly as may be in the way in which the courts of the other State would determine them, and to this end, will abide by a statute or, in the absence of a statute, by the decision of the courts of the State in which the contract or transaction had its origin. A different policy would lead to the most serious confusion, if not revolution among the States. Decisions announcing this principle are numerous and reassuring, prominent among which is the very vigorous decision ren-

dered by the Supreme Court of Pennsylvania, in the case of *Forepaugh v. Delaware L. & W. R. R. Co.*, 128 Pa., 217, 5 L. R. A., 508.

As Applied Between Nations.

What has been said of the judicial comity of the States, is likewise true of Nations. The words of the great Chief Justice, Marshall, in the case of *Elmerndorf v. Taylor*, 10 Wheaton, 152, are luminous upon this subject:

"This court has universally professed its disposition, in cases depending on the laws of a particular State, to adopt the construction which the courts of the State have given to those laws. This course is founded on the principle, supposed to be universally recognized, that the judicial department of every government, where such departments exist, is the appropriate organ for construing the legislative acts of that government. Thus, no court in the universe, which professes to be governed by principle, would, we presume, undertake to say that the courts of Great Britain, or of France, or of any other nation, had misunderstood their own statutes, and therefore erect itself into a tribunal which should correct such misunderstanding.

"We receive the construction given by the courts of the Nation as the true sense of the law, and feel ourselves no more at liberty to depart from that construction than to depart from the words of the statute. On this principle, the construction given by this court to the Constitution and laws of the United States is received by all as the true construction, and on the same principle, the construction given by the courts of the several States to the legislative acts of those States, is received as true, unless they come in conflict with the Constitution, laws, or treaties of the United States."

While it is true that the above words, when literally applied, refer to the construction given to Legislative Acts, the principle of judicial comity therein expressed, has been given wider scope and applied to "a line of decisions (by the highest courts of a State) so uniform and well settled as to establish rules of property or of conduct which it would be wrong to disturb." (See *Bucher v. Chesire*, 125 U. S., 555; *Burgess v. Sligman*, 107 U. S., 20; *Kuhn v. Fairmount Coal Co.*, 215 U. S., 349.)

As Applied Between State and Federal Courts.

The difficulties incident to our dual system of State and Federal courts, invested with powers derived from different sovereignties, but sitting within the same territorial boundaries, and having partially concurrent jurisdiction, and professing to administer the same laws, have given rise to many serious questions, the attempted solution of which has engaged the ripest thought and most serious consideration of our ablest minds since the beginning of our government.

That "unseemly conflicts" have arisen between our State and Federal courts, is a matter to be deeply deplored. This is the only discordant note in our otherwise harmonious, though complex, system of government, wherein a sovereignty exists within a sovereignty, and in which all other governmental elements are attuned to perfect consonance. This is all the more astounding when viewed in the light that, of the three co-ordinate departments of our Federal Government, those entrusted with the administration of the judicial affairs of the Nation, are selected with reference to their especial fitness to perform the important duties entrusted to them, and are independent of the elective franchise of the people.

Various causes have been assigned, and remedies suggested, for these "unseemly conflicts" which have given rise to no small measure of criticism from high sources, not

to mention the well founded apprehension which has ensued. Chief, perhaps, among the causes of this condition, is the want of a common appellate tribunal in which these divergent opinions could be harmonized and the conflicting decisions unified. In the absence of such a supervising tribunal, the only remedy lies in the observance of those principles "founded on comity and good sense" suggested in the case of *Burgess v. Seligman*, 107 U. S., 20.

With due respect for our courts (and the writer yields to none as having a higher veneration for our judiciary than he), it is the writer's belief that with a proper regard for the fundamental principles of our government, such as was observed during the first half century of our National history, there would have been no occasion to deplore this "unseemly conflict" between our State and Federal courts.

It is unbelievable that the people, in whom all power rests, ever intended, by the Constitution, or the laws of Congress, to confer upon our Federal courts the power, right or jurisdiction to mete out to one citizen, or class of citizens, rights or remedies not enjoyed by every other citizen within the realm of our National domain. And yet, this very thing is frequently done by this "unseemly conflict" just referred to. In the case of *Kuhn v. Fairmount Coal Co.*, 215 U. S., 349, a suit was brought by a citizen of Ohio against a West Virginia corporation, to recover damages for the subsidence of the surface-land, in consequence of the defendant's failure to leave sufficient support, when it mined the underlying coal. By his deed, Kuhn, the plaintiff, had conveyed to the defendant "all the coal" underneath the tract in question, and it had been held by the highest court of that state, in *Griffin v. Fairmount Coal Co.*, 59 W. Va., 480, in an identical case, decided, however, after the execution of the deed in question, that in such case there is no implied reservation of the right to

support. The Federal court, however, upon which jurisdiction was conferred wholly by virtue of the diversity of citizenship of the parties, held otherwise, and thus, the plaintiff, Kuhn, was granted a remedy which would be denied every citizen of West Virginia under the same circumstances. Thus, there are two rules of property within the same State—one for the *residents*, the other for a *non-resident* of the State, based upon identical transactions. It is refreshing to note that this was not accomplished without a vigorous protest by Mr. Justice Holmes, concurred in by our present Chief Justice and by Mr. Justice McKenna.

Other similar instances, though not frequent, are not wanting. In the case of *Swift v. Tyson*, 16 Peters, 1, a bill of exchange was executed in New York, was payable in New York, and was concededly governed by the laws of New York. As announced by the courts of that State, the maker was not liable to an endorsee of the bill. A citizen of Maine having acquired this bill by endorsement, and availing himself of the place of his residence to evade the established laws of New York, brought suit in the Circuit Court of the United States for the Southern District of New York, whose duty it was to administer the laws of New York, and on certificate of division from that court, the case was transferred to the Supreme Court of the United States where full recovery was awarded on the bill. Thus a citizen of Maine is granted rights and remedies, ostensibly under the laws of New York, which would be denied every citizen of that State under identical circumstances save that of citizenship.

Under this system of jurisprudence, two notes are given in the same transaction, each representing a part of the same debt. One of these notes, at maturity, is held by an endorsee residing in the same state in which the maker resides, therefore, for lack of diversity of citizenship, suit

must be brought in the State court, where, by setting up the equities, the maker escapes liability. The other note, because of its worthless character under the laws of the State in which it was procured by fraud, is endorsed to a citizen of another State for a trifling consideration, and who, by virtue of the diversity of citizenship thus designedly created, sues in a Federal court, sitting in the same State where the other note was sued on, and administering the same laws, and in that court, the defendant is held liable!

For our present purpose, other instances need not be cited. Reference is made to these only to emphasize the point we are endeavoring to make, that it was not the purpose of the people of this Nation, by our Constitution or laws of Congress, to make possible such results. It was to avoid such "unseemly conflicts" between the States, that the "Full Faith and Credit" clause was embodied in our Constitution. And if the courts of one State are required to give "Full Faith and Credit" to the "judicial proceedings of every other State," on principle, and for the same reason, should not the Federal courts, when sitting in a State for the purpose of administering the laws, statutory or otherwise, of that State, also give "Full Faith and Credit" to the "judicial proceedings" of the State whose laws they profess to administer?

In the Declaration of Independence it is affirmed: "We hold these truths to be self-evident: *That all men are created equal*; that they are endowed by their Creator with certain unalienable rights; that among these are Life, Liberty and the Pursuit of Happiness. That to secure these rights, Governments are instituted among men, deriving their just powers from the consent of the governed. That when any form of Government becomes destructive of these ends, it is the Right of the People to alter or abolish it, and to establish new Government, laying its

foundation on such principles, and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness."

One of the cardinal principles of our Government is that every citizen shall enjoy equal rights with every other citizen. "Equality before the Law" has ever been the exultant pride of American citizenship,—the very keystone of the arch upon which the whole superstructure of our social compact rests. And it was to secure this much vaunted equality that jurisdiction was given to our Federal courts in "Controversies between Citizens of Different States." Has this salutary provision of our Constitution failed in its purpose, and has the end sought to be accomplished, been defeated? In the instances above cited, was not the non-resident litigant given a greater measure of relief than that accorded the resident litigant? Has not the remedy produced the very result sought to be remedied? Has not the cure created the very disease it was intended to prevent? It is but a hollow mockery to proclaim "Equal Rights to All," unless Equal Remedies are given to all by which those rights may be made secure.

It is not too much to say that the period of five years following the Treaty of 1783, was the most critical of all the history of the American people. During the War, the presence of hostile armies had a greater cohesive influence upon the Colonies than the Articles of Confederation. The Colonies, differing in habits, in customs, in occupations, in resources, had been for a few years united by a common danger. But with that danger gone, all animosities, all jealousies, all selfish prejudices broke forth again with renewed strength, and the Union seemed likely to be dissolved. It was with these conditions fresh in the minds of the founders of our Government that every safeguard was thrown around citizens who might be affected in their rights by local prejudices, and to this end, provi-

sion was made in the Constitution for extending the jurisdiction of the Federal courts to "Controversies between citizens of Different States." But it never was intended to give to citizens of different States a different standard by which their respective rights should be measured within the same State. Nor are we without historical data upon which to predicate the assertion that if such an interpretation had been placed upon that provision of the Constitution by its framers, it never would have been adopted by the States.

In the Ratifying Convention of Virginia, the question as to the meaning and purpose of this clause of the Constitution was raised by George Mason, a delegate to that convention, to which Patrick Henry, likewise a delegate, lent his clarion voice in these words:

"I shall give my voice to the Federal cognizance only where it be for the public liberty and safety. Its jurisdiction, in disputes between citizens of different States, will be productive of the most serious inconveniences. The citizens of bordering States have frequent intercourse with one another. From the proximity of the States to each other, a multiplicity of these suits will be instituted. I beg gentlemen to inform me this—in what courts are they to go and by what are they to be tried? Is it by the laws of Pennsylvania or of Virginia?"

To this John Marshall replied:

"The honorable member objects to suits being instituted in Federal courts, by citizens of one State, against the citizens of another State. Were I to contend that this were necessary in all cases, and that the Government without it would be defective, I should not use my own judgment. But are not the objections to it carried too far? * * * In the court of which State will it be instituted? said the

honorable gentleman. It will be instituted in the court of the State where the defendant resides, where the law can come at him, and nowhere else. By the laws of which State will it be determined? he said. *By the laws of the State where the contract was made.* According to those laws, *and those only*, can it be decided. Is this a novelty? No, it is a principle in the jurisprudence of this commonwealth. If a man contract a debt in the East Indies, and it was sued for here, the decision must be consonant to the laws of that country. Suppose a contract made in Maryland, where the annual interest is six per centum, and a suit instituted for it in Virginia; what interest would be given now, without any Federal aid? The interest of Maryland most certainly; and if the contract had been made in Virginia, and suit brought in Maryland, the interest of Virginia must be given, without doubt. It is now to be governed by the laws of the State where the contract was made. *The laws which govern the contract at its formation, govern it in its decision.*" (See the "Growth of the Constitution" by Wm. M. Meigs, pp. 334-340).

Here is the interpretation placed upon that provision of the Constitution, before it was adopted, by the great minds which created it. Here was a solemn covenant with the people, accepted by the people and acted upon by them when they adopted the Constitution. And for years afterward,—during the formative period,—when the strength of the Nation was knitting, and while those great minds were kneading and moulding the discordant elements of the heterogeneous usages and customs of the Colonists into definite form, under the Constitution, that covenant was never broken, but was faithfully kept while Marshall lived. And if, as is generally believed, a special Providence gave to us a great military leader in the emergency

of our Revolutionary struggle, it was another manifestation of that same Power,—when our new system was to be applied,—that gave to us John Marshall to be Chief Justice of the United States. His services have left a deeper imprint on our Governmental system, than all the victories won on battle-fields.

No better evidence is wanted as to what was the meaning and purpose of that provision of the Constitution than is reflected by the words and conduct of those who, not only created the Constitution, and were acquainted with the spirit of the times, but applied it during the first half century of our National existence.

As early as the year 1789, in the case of *Brown v. Van Braam*, 3 Dallas, 344, involving a question of purely "Commercial Law," the concluding words of the court are: "We are unanimously of the opinion, that under the laws, and the practical construction of the courts of Rhode Island (in which the bill of exchange sued on had its *situs*), the judgment ought to be affirmed."

In 1803, in the case of *Mandeville v. Riddle*, 1 Cranch, 290, another case of purely "Commercial Law," the sole question discussed by counsel or alluded to by Chief Justice Marshall, speaking for the court, was whether under the laws of Virginia, the State in which the note sued on had its *situs*, an action at law could be maintained by the holder of a note against a remote endorser. The entire syllabus of the case is in these words:

"In Virginia, an endorsee of a promissory note can not maintain an action against a remote endorser for want of privity."

No hint is found of any all-pervading "Commercial Law," or rule of "General Jurisprudence," but the inquiry was, "What is the law of Virginia, upon the question involved? When the law of Virginia was ascertained, and it was found that an action at law could not be main-

tained in a court of that State, such judgment was promptly rendered as would have been given in the State court, if the action had been brought there. The great Chief Justice, saturated as he was with the spirit and purpose of the provision under which the Federal court was given jurisdiction in that case, could not find it in his broad mind or honest heart to seize upon the mere accident of a diversity of citizenship to give a remedy to a citizen of another state which would be denied to all citizens of Virginia who, for want of the requisite diversity of citizenship, were barred from the Federal courts.

Again, in 1809, in *Riddle v. Mandeville*, 5 Cranch, 322, the same plaintiff brought a suit in equity against the same defendant, based upon the same note. And again, the same court, having satisfied themselves that, under the laws of Virginia, as announced by her courts, relief would be granted if the suit had been brought in the State court, with the same alacrity, rendered a decree in favor of the plaintiff. The first paragraph of the syllabus of the decision is in these words:

“The endorsee of a promissory note, in Virginia, may recover the amount from a remote endorser, in equity, but not at law.”

Here is fully exemplified the function of the Federal courts when administering the laws of a State, under the divers citizenship provision of the Constitution. The same court which would not give to a non-resident a remedy which would be withheld from a resident, likewise refused to withhold from a non-resident a remedy which would be given a resident of the state. Under such administration of the law, and none other, can equal justice be given to all and the purpose of the Constitution fully met.

Other examples are not few, but we can not notice them all in detail without unduly extending this argument. These cases are cited merely for the purpose of

illustration, and yet, it seems incredible that even an illustration should be required to sustain a proposition so obvious, or a principle so eminently just. In passing, however, we can not refrain from noticing a few more instances that lay in our pathway.

In 1805, in the case of *Telfair v. Stead*, 2 Cranch, 407, the entire opinion by Chief Justice Marshall is in these words:

"The only doubt which the court had was whether by the laws of Georgia, the land could be made liable, unless the heir was a party to the suit. We have received information as to the construction given by the courts of Georgia to the Statute of 5 Geo. 11, making lands in the Colonies liable for debts, and we are satisfied that they are considered as chargeable without making the heir a party."

In 1816, in *Patten v. Easton*, 1 Wheaton, 476, involving the question of adverse possession of land in Tennessee, the court held that the "possession of seven years is a bar only when held under a grant, or a deed founded on a grant." Again, in 1829, in *Powell v. Harman*, 2 Peters, 214, the same court rendered a decision to the same effect. In 1832, in *Green v. Neal*, 6 Peters, 292, the United States Supreme Court, without hesitation, overruled the two former decisions for the sole reason that in the meantime, the courts of Tennessee had placed a different construction on the statute in question, from that given by the Supreme Court of the United States, and the later decision was made in conformity with the ruling of the State court. This would seem to be carrying the principle of comity to the limit, yet it is a striking example of the interpretation placed upon the prerogative of Federal courts in citizenship cases, by the founders of our Government.

In 1825, in *Elmdorf v. Taylor*, 10 Wheaton, 159, involving the question of adverse possession of land in

Kentucky, with his characteristic fidelity to principle, Chief Justice Marshall, among other things said:

"Were this question now for the first time to be decided, a considerable contrariety of opinion respecting it would prevail in the court; but it will be unnecessary to discuss it, if the point shall appear to be settled in Kentucky."

In 1827, in *Jackson v. Chew*, 12 Wheaton, 153, the Supreme court followed the decision of the courts of New York as to the meaning of a will having its *situs* in that state. The second and third paragraphs of the syllabus of the decision are in these words:

"This court adopts the local law of real property, as ascertained by the decisions of the State courts, whether those decisions are grounded on the construction of the statutes of the State, or from a part of the unwritten law of the State."

"The court, therefore, considers it unnecessary to examine the question arising upon the above devise, as a question of general law; or to review, and attempt to reconcile the cases in the English courts upon similar clauses in wills, the construction of this clause having been long settled by a uniform series of adjudications in New York, and having become a fixed rule of property in that state."

This case was presented by no less luminaries than William Wert, Esq., Attorney General, and Mr. D. B. Ogden, for the plaintiff, and by Mr. Daniel Webster and Mr. Henry Wheaton, for the defendant.

In the opinion by Mr. Justice Thompson, an associate of Chief Justice Marshall, the court said:

"The inquiry is very much narrowed by applying the rule which has uniformly governed this court, that where any principle of law, establishing a rule

of property, has been settled in the State courts, the same rule will be applied by this court that would be applied by the State tribunals. This is a principle so obviously just, and so indispensably necessary, under our system of government, that it can not be lost sight of."

In 1831, in *Henderson v. Griffin*, 5 Peters, 151, the United States Supreme Court, by Mr. Justice Baldwin, another associate of Chief Justice Marshall, followed, not a "uniform series of adjudications," but a *single* decision of the highest court of South Carolina, not as to the "construction of a statute," but based on the State court's view of the common law of that state. In the opinion, the court used this language:

"The opinion of the court in the case of *Kennedy v. Marsh*, was an able and deliberate one; it was a judicial construction of the will of Mr. Laurens according to their view of the rules of the common law in that State as a rule of property, and comes within the principle adopted by this court in *Jackson v. Chew* (12 Wheat. Rep., 153, 167), that such decisions are entitled to the same respect as those which are given on the construction of local statutes. By so considering it, and adopting it as a rule by which to decide this case, it follows conclusively that * * * the decided opinion of the highest court of South Carolina renders it unnecessary for the court to express their own opinion on the will."

Again, in 1829, an example of the zeal employed to avoid "unseemly conflicts" in overlapping jurisdictions, is found in the case of *Bank of Hamilton v. Dudley*, 2 Peters, 492. This was in the Supreme Court on writ of error to the Circuit court for the Seventh Circuit and District of Ohio. When the case was argued in the

Supreme Court, the court was informed that the question on which the case turned was then pending in another suit in the Supreme Court of Ohio. Out of a desire to be guided by the State decision, the Supreme Court held the case under advisement until the State court had decided the question and then, by Chief Justice Marshall, rendered their decision in accordance therewith.

Nor was the dignity of that high court lowered by this deference to the decisions of the State courts in local matters. On the contrary, it showed a breadth and depth and loftiness of character, purity of purpose and fidelity to principle, too strong to be swayed by petty jealousy,—too sacred to be influenced by personal prejudice.

It was not until 1842, in *Swift v. Tyson*, 16 Peters, 1, that a breach was made in the citadel of judicial comity. That breach, once made, soon widened, and for a time it seemed that the whole structure reared by Marshall and his associates with so much care, would be destroyed and the labors of more than half a century lost.

Swift v. Tyson was soon followed by *Lane v. Vick*, 3 Howard, 464, in which the court refused to follow the decision of the highest court of Mississippi as to the meaning of a will having its *situs* and affecting land in that state. That the beneficent teaching of Marshall and his associates had not been wholly forgotten, is evidenced by the strong dissenting opinion by Mr. Justice McKinley, concurred in by Chief Justice Taney. The whole of this dissenting opinion is full of wisdom. Among the introductory words are the following: "In this case, I differ in opinion with a majority of the court, not only on the construction of the will, but upon a question of much greater importance, and that is, whether the construction given to this will by the Supreme Court of Mississippi is not binding on this court."

Further in the dissenting opinion it is said:

"If the State judicial tribunal establish a rule governing titles to real estate, whether it arise under statute, deed, or will, and this court establishes another and different rule, which of these two rules shall prevail? They do not operate like two equal powers in physics, one neutralizing the other; but they produce a contest for success, a struggle for victory; and in such a contest, it may be easily foreseen which will prevail.

"The State courts have unlimited jurisdiction over all the persons and property, real and personal, within the limits of the state. And as often as the courts of the United States have it in their power, by their judgments, under their limited jurisdiction, to turn out of the possession of real estate those who have been put into it by the judgment of the highest court of appellate jurisdiction of the State, so often that possession will be restored by the same judicial State power. To avert such a contest, and in obedience to the Act of Congress before referred to, this court have laid it down, in many cases, as a sound and necessary rule, that they should follow the State decisions establishing rules and regulating titles to real estate."

Again, in *Foxcraft v. Mallet*, 4 Howard 353, in an opinion by Mr. Justice Woodbury, the United States Supreme Court refused to follow the ruling of the highest court of Maine as to the construction of a deed, citing *Lane v. Vick*, *supra*.

In the following year, 1847, the departure reached the extreme limit, when, in *Rowan v. Runnels*, 5 Howard, 134, the Supreme Court refused to follow the ruling of the State courts in regard to the meaning of the Constitution of the State. The opinion was by Chief Justice Taney and

it is difficult to harmonize with the strong dissenting opinion, in which he concurred, in *Lane v. Vick*, *supra*.

Six years earlier, in *Groves v. Slaughter*, 15 Peters, 449, in the absence of any expression of the State court upon the subject, the Supreme Court of the United States placed their own construction on the same provision of the Constitution of Mississippi. In the meantime, the highest court of that State had placed a construction on the same provision, which was at variance with that placed upon it by the Supreme Court in *Groves v. Slaughter*. The Supreme Court, however, refused to follow the State court, but adhered to their former decision.

How different was this course from that in the case of *Green v. Neal*, *supra*, by which two former decisions of the United States Supreme Court were overruled in order to follow the decision of the State court, which had been subsequently rendered, in relation to the meaning of a local statute!

Again, in 1849, the Supreme Court, in *Williamson v. Berry*, 8 Howard, 495, refused to follow the interpretation of an Act of the Legislature of the state of New York, placed upon it by the courts of that state. The case came to the Supreme Court from the Circuit Court of the United States for the Southern District of New York, on a certificate of division in opinion of the judges of that court. Not only did the case involve the construction of a local statute, placed upon it by the highest court of that State, but also affected the title to real estate. The case was ably presented by counsel. In summing up the argument of Mr. Webster, for the plaintiff, it is shown that he contended that "the attempt now made by defendant's counsel was nothing less than an attempt to overthrow the whole substance of the New York decisions." The able dissenting opinion by Mr. Justice Nelson, con-

curred in by Mr. Justice Carton and Chief Justice Taney, closes with the following words italicised:

"I can not consent to the introduction into this court of any such principle, and am, therefore, obliged to refuse a concurrence in the judgment given."

Thus in seven brief years was destroyed the splendid monument of judicial comity that was more than half a century in building. But the foundation, resting as it was upon solid rock of eternal right, remained, and it will be re-built stronger than before.

In the same year, 1849, showing the effort to adhere to the precedents established by Marshall and his associates, in the case of *Smith v. Kernochan*, 7 Howard, 198, the Supreme Court followed the decision of the highest court of Alabama, as to the validity of a mortgage. The last paragraph of the syllabus of the case is in these words:

"The highest court of the State of Alabama having decided that the original mortgagee (an incorporated company) violated its charter in the transaction which led to the mortgage, this court adopts its construction of the statute of that State."

And still again in the same year, in *Nesmith v. Sheldon*, 7 Howard, 812, the Supreme Court again adhered to a decision of the highest court of a State, the last paragraph of the syllabus of the decision being in these words:

"The Supreme Court of the State of Michigan has so construed its constitution, and it is the established doctrine of this court, that it will adopt and follow the decisions of the State courts in the construction of their own statutes where that construction has been settled by the decision of their highest judicial tribunal."

Surely we are now returning to the ancient landmarks. In 1860, in *Suydam v. Williamson*, 24 Howard, 427, the Supreme Court of the United States overruled

their decision in *Williamson v. Berry*, *supra*, and followed the decision of the courts of New York as to the meaning of an Act of the Legislature of that State. We refrain from quoting from this decision in the hope that this court, if not conversant with it, will examine it with especial care in the light of the history of the case. The syllabi, which fairly suggest the text of the opinion, are the following:

"State laws govern as to title and transfer of real property,—this court will follow States rules of property, even if contrary to its own opinion."

"The power to establish Federal courts, and to endow them with jurisdiction, affords no pretext for abrogating any established law of property, or for removing any obligation of her citizens to submit to the rule of the local sovereignty."

"Where the subject of dispute is real property situated within a State, her laws exclusively govern in respect to the rights of the parties, the modes of transfer, and the solemnities which should accompany them."

"Where a contrary opinion to that expressed by this court has prevailed in the courts of a State, and become a rule of property there, this court, without re-examining their own opinion, or making any attempt to account for or to reconcile the difference, will apply the rule adopted in such State, to the determination of controversies existing there."

Here the breaking of the cherished idols of the past was checked—the destroying hand of the iconoclast was stayed—and the great judicial pendulum swung back again to plumb, and for a time stood still; in later years, it has vibrated with some uncertain motion, but with more restraint and stable purpose than in the brief destructive period just described.

As to the Rule of "General Jurisprudence."

With due deference to this high court, but preferring frankness to flattery, we are impelled to say that when a rule has been established in a State, whether that rule be one of property or of conduct, and whether based on a Constitutional Provision, Legislative Act or Judicial Proclamation, no sound reason exists, or can exist, for a departure from that rule, by a Federal court.

In *Swift v. Tyson*, *supra*,—the first pronounced departure—the court undertook to justify the innovation upon the theory that the question involved was one of "general commercial law" which the court was at liberty to apply, even though at variance with the rule of commercial law of the State, as defined by the decisions of the State courts. This was followed by other like departures on the theory of applying a rule of "general jurisprudence" or of "common law" assumed to exist in the State but not discovered, or at least not applied, by the State courts. We submit that, by whatever name it may be called, the theory upon which this departure rests is not sound, and the practice is not in harmony with the spirit, purpose, meaning or intent of Article 3 of the Constitution, and the legislation of Congress in pursuance thereof, conferring upon the Circuit Courts of the United States "original cognizance concurrent with the courts of the several States, of all suits of a civil nature, at common law or in equity, * * * in which there shall be a controversy between citizens of different States."

In the first place, we would ask, whence came this all-pervading "Commercial Law" or "Common Law" or "Rule of General Jurisprudence?" Law is defined as being a "Rule of Action prescribed by a Superior Power, commanding what is right and forbidding what is wrong." By what "Superior Power" was this "Rule of General Jurisprudence" prescribed? If by these expressions is

meant the old common law of England, then we would ask, of what period—of what date? That common law was made up of the habits, customs and usages of the English people crystalized into fixed rules of conduct or of property, recognized by the courts and by them given the force and effect of positive law. But these customs changed with succeeding generations as order was being evolved out of chaos.

Prior to the time of Alfred if, indeed, not down into the reign of King John, when, less than seven centuries ago, at Runnimeade, the strong and stalwart barons, standing with their hands on their sword hilts, wrenched from that perfidious monarch the Magna Charta, the whole of the English common law could be expressed in three words—“*Might Makes Right.*” Since then the common law of England has taken more definite shape and the expression today has a well defined meaning.

But the common law of England never became the common law of the United States. Indeed, we have no National Common Law. The 34th section of the Judiciary Act of 1789 (Section 721 U. S. Comp. Stat. 1901) provides: “That the laws of the several States, except where the Constitution, Treaties or Statutes of the United States otherwise provide, shall be regarded as rules of decisions in trials at common law, in the courts of the United States, in cases where they apply.”

So that, in any trial at common law, a Circuit Court of the United States, where its jurisdiction is founded on divers citizenship, has to inquire what the law of the State, in which its jurisdiction is exercised, may be, and it is the law of that State, whether statute or common law, that it is called upon to administer.

Whence comes the law of the State? Primarily, the power to either make or adopt any law rests with the people. By their Constitution, the people of a State may

declare the fundamental law of that State, not in conflict with the Constitution, Laws or Treaties of the United States. And they may delegate the power to their legislative bodies to make such laws, within the above prescribed limits, as they may see fit. And they may create and establish courts and delegate to them the power, not only to construe and enforce the written laws of the State, but likewise to determine what the common law of the State is, and to apply it in the administration of the judicial affairs of the State. This common law of the State is not necessarily borrowed from the common law of England, but it is the inherent, intuitive sense of right which has existed since time began and will endure forever. In its application, our courts are governed by local conditions, both physical and social, as well as by fundamental principles, all of which flow from the source of their existence and the nature of our republican form of Government.

The people of the United States erected their Constitutions and forms of Government to establish justice, to promote the general welfare, to secure the blessings of liberty, and to protect their persons and property from violence, and to this end, created courts and commissioned them with the power necessary for the accomplishment of these important purposes. And any judicial act contrary to the great first principles of our social compact, can not be considered of judicial authority. The obligation of law in Governments, established on expressed compact and on republican principles, must be determined by the nature of the power on which it is founded. And if a court goes counter to the expressed or implied purpose of their creation, it amounts to judicial heresy or judicial usurpation.

With these principles as our beacon light, we would inquire, what was the object sought to be accomplished by

creating this dual system of courts within the State? For what purpose were Federal courts given jurisdiction, in any event, to administer the laws of a State, in local matters in which no Federal question is involved? Was it to create within the State a rule of property or of conduct for non-residents, different from the rule within the State by which all the citizens thereof are governed? Was it the purpose to give to one citizen, or class of citizens, rights and remedies which are denied all other citizens? Is such favoritism a part of the "Great First Principles" upon which our Government is founded? And is this the spirit which prompted the people of this country to adopt the Fourteenth Amendment of the Constitution? By it they have declared:

"All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The State courts are given unlimited jurisdiction of all persons and property, of every kind, within the limits of the State, and are commissioned to faithfully administer all laws, both written and unwritten, in relation thereto. And while the Federal courts, in certain instances, are given co-ordinate jurisdiction with the State courts, they are not given *superior* jurisdiction. The powers of these courts being co-ordinate, it follows that their obligation should likewise be co-ordinate. This narrows the inquiry to a single proposition:

Where a State court has established rules of property or of conduct by which all the citizens of the State

are bound, if a citizen of another State comes into that State with an action,—whether at law or in equity, and whether based on statute or common law,—against a citizen of that State, should the State court grant him a greater, or a less measure of relief than would be granted a citizen of that State?

Both law and morals forbid that either should be done. To grant him either a greater or a less relief than would be granted a citizen of the State, under like circumstances, would be contrary to the genius of free Government. Such a course would be shocking to every sense of right and justice. And it was to guard against the possibility of such results, that a non-resident was given the privilege of choosing his forum,—a privilege not accorded a resident litigant.

If it would be wrong for a State court to discriminate against a non-resident by giving him a less measure of relief than would be granted a resident, would it not be equally wrong for a Federal court—while administering State laws—to in like manner discriminate against a resident of the State by giving the non-resident a greater measure of relief than a resident could obtain in any court that is open to him? The very purpose of conferring jurisdiction on Federal courts was to secure *equality*. Then why should it work *inequality*? When this is done, whether it be by administering a different rule of “Commercial Law” or of “Common Law” or of “General Jurisprudence,” from that established in the State, is not the evil result the same, and as much to be deplored, as if the conflict arose in the construction of a local statute or any other written law of the State?

Why should a non-resident have cause to complain if his rights are measured by the same rule that has been adopted as a standard for residents in the same situation, especially as he may insist that the rule shall be

applied by a Federal court? It is only when a State court should depart from its established precedents in meting out to a non-resident a different measure of relief from that given to residents, that there is cause to complain, and it was to avoid a possibility of such results that jurisdiction was conferred upon Federal courts in "controversies between citizens of different States."

It Invites Tricks and Subterfuges.

Not only are these "unseemly conflicts" to be deplored for the reasons already given, but for other reasons equally potent. Not only is the non-resident given an advantage over the resident litigant in that he may choose between the State and Federal courts, and where a double rule exists may select the forum most advantageous to him, but as a natural sequence to these conflicting rules within the same State, trickery and subterfuges are resorted to and advantage is taken of the opportunity thus afforded.

A contract was entered into between citizens of a State which was known to be void under the established decisions of the State courts, when it was executed, and this fact entered largely into the negotiations and governed the amount of consideration. It remained void so long as it was held by a citizen of that State. But in order to evade the established law under which it was executed, the holder of the void contract went to another State in order to create a diversity of citizenship necessary to give the Federal court jurisdiction. The contract which was void at its inception, now becomes valid under a Federal rule, and the holder returns to the State in which the contract had its *situs*, institutes suit in the Federal court and recovers on the contract. This is done although there are thousands of similar contracts held by citizens of the State and on which there can be no recov-

ery for want of "diversity of citizenship" necessary to give the Federal court jurisdiction.

The case assumed is not an extreme one. Instances even more pronounced are not uncommon. Fraudulent assignments are frequently made to residents of other States, of contracts, promissory notes, bills of exchange, interest coupons clipped from void municipal bonds, and the like, to create a colorable diversity of citizenship for no other purpose than to give a Federal court jurisdiction in States where similar instruments, or instruments of the same series, have been held void by the State courts. The cases of *Farmington v. Pillsbury*, 114 U. S., 138, and *Little v. Giles*, 118 U. S., 596, are instances of this type. In *Stewart v. Lansing*, 104 U. S., 505, it is plain that no such human being existed on earth as the plaintiff. The name was invented and was called a citizen of another State in order to give the Federal court jurisdiction.

In the case of *Bucher v. R. R. Co.*, 125 U.S., 555, the plaintiff brought suit in the State court and there recovered judgment. On appeal, the case was reversed and, seeing recovery in the State court hopeless, he took a non-suit and filed his case in the Federal court, hoping to profit by a contrary ruling in that court but failed. And in the very recent case of *Snare v. Triest Company*, 191 Fed. Rep., 1, the same thing was done with the result that in the Federal court recovery was had which was denied by the highest court of the State.

The cases at bar were originally brought in the State court in Crawford County, Illinois. While they were pending in that court, the Supreme court of that state announced certain decisions in which the identical questions here in controversy were decided adversely to the petitioners. Whereupon, these cases were dismissed in the State court and filed in the United States Circuit Court for the Eastern District of Illinois, and in that court an

old and well established rule—not only of the State court, but likewise of the United States Circuit Court of Appeals, for that Circuit,—was ignored and a new and different rule was applied, although the contracts were executed in Illinois, relate to property in Illinois, and from the very nature of their subject-matter, they can be performed in no other place than in Illinois.

But it is useless to go on. Enough has been said to conclusively show the evil that exists and to suggest the remedy. These conditions are a direct and inevitable result of creating a double rule of property or of conduct within the same territorial jurisdiction,—one for the resident, the other for the non-resident. This evil was long foreseen and was fittingly described by that eminent Justice, Bushrod Washington, when in *Golden v. Prince*, 3 Wash., 313, he wrote: "The injustice, as well as absurdity, of the Federal courts deciding by one rule, and the State courts by another, would be too monstrous to find a place in any system of government." This was long before the case of *Swift v. Tyson*, and when no such "absurdity" was thought to be possible under any system of jurisprudence. But since that time, that very thing has "found a place" in our own "system of Government."

While our discussion of this subject has taken a general trend, we are not without eminent precedent in the application of what we believe to be the true rule, to the class of contracts involved in these cases. Not only has this principle of judicial comity been applied to cases involving oil and gas as "property," but likewise to the construction of leases of this character as to their legal status and effect.

In the case of *Ohio Oil Company v. Indiana*, 177 U. S., 190, this court by Mr. Justice White, now Chief Justice White, said:

"The doctrine that a land owner, although enti-

tled to bore wells for natural gas and oil, has no title to those substances as owner until they are actually reduced by him to possession, *is settled as a rule of property in the State of Indiana.*"

In the case of *Huggins v. Daley*, 99 Fed. Rep., 606, the United States Circuit Court of Appeals for the Fourth Circuit, in this relation said:

"Numerous cases were cited—among them those from West Virginia—which this court held to lay down rules of property stating the controlling doctrine peculiar to mining leases in that State *which the Federal Courts will recognize and follow.*"

In the case of *Foster v. Elk Fork Oil & Gas Co.*, 90 Fed. Rep., 178, the same court said:

"The contract we are construing is a contract made and to be performed in West Virginia. It is a contract relating to land in that State. The cases quoted lay down a rule of property, stating the controlling doctrine peculiar to mining leases in that State. *The Federal Courts recognize and follow the decision of courts of last resort in the State.*"

In the case of *Federal Oil Co. v. Western Oil Co.*, 121 Fed. Rep., 674, the United States Circuit Court of Appeals for the Seventh Circuit, used this language:

"The nature of property in natural gas and oil contained in the earth, and the legal effect of the instrument here in question, (a gas and oil lease) *have been settled authoritatively by the rulings of the Supreme Court of Indiana.*"

The above will be sufficient to show the application of the rule to the questions involved in the cases at bar. Assuming, as we confidently do, that the rule will be observed by this court, it will very much simplify the questions here involved to determine whether these ques-

tions "have been settled authoritatively by the ruling of the Supreme Court of" Illinois.

This leads to the closely related subject embraced in the next proposition.

PROPOSITION XIII.

Stare Decisis, et non Quia Movere.

The questions involved in these cases having been firmly settled by a long and uniform line of decisions by the highest court of Illinois, and by the highest Federal court in that jurisdiction, and likewise by the United States Supreme Court, these decisions should forever foreclose further agitation of these questions in that State.

Early in the history of the State, the Supreme court of Illinois adopted and announced rules governing contracts, and these rules have been so faithfully adhered to by the courts and observed by the people in their conduct and negotiations, as to become a part of the fixed judicial and industrial fabric of that commonwealth.

In the case of *Chicago Mun. Gas Light Co. v. Town of Lake*, 130 Ill., 42, the Supreme court adopted, as the law of Illinois, the rule stated in 3 *Pomroy's Equity Jurisprudence*, Sec. 1314, which is in these words:

"An injunction restraining the breach of a contract is a negative specific enforcement of that contract. The jurisdiction of equity to grant such injunction is substantially coincident with its jurisdiction to compel a specific performance. Both are governed by the same doctrine and rules; and it may be stated as a general proposition that, wherever the contract is one of a class which will be affirmatively specifically enforced, a court of equity will restrain its breach by injunction, if this is the only practical

mode of enforcement which its terms will permit."

This rule has been many times reiterated by the same court and is the law of that State by which every citizen thereof must be governed, as much so as if it had been enacted by the legislative body of the State or embodied in its constitution. It therefore only remains to determine what the law of that State is in relation to the enforcement of contracts by either the affirmative or the negative method.

As early as the year, 1843, in the case of *Frisby et al. v. Ballance et al.*, 4 Scammon, 287 (5 Ill. 287), the Supreme court announced this rule:

"Specific performance of a contract is addressed to the sound legal discretion of the court; and it is not a matter of course that it will be decreed because a legal contract is shown to exist. * * * It is not necessary to authorize this court to refuse a specific performance that the agreement should be so tainted with fraud as to authorize a decree that it shall be given up and cancelled on that account. (Citing authorities.)

"A specific performance will not be decreed unless the agreement has been entered into with perfect fairness and without misapprehension, misrepresentation, or oppression."

In 1875, in *Bowman v. Cunningham*, 78 Ill., 48, the Supreme court of Illinois, in a suit for specific performance, announced this rule:

"Courts of equity will decree specific performance where the contract is in writing, and is certain, and is fair in all its parts, and is for an adequate consideration, and is capable of being performed, but not otherwise."

These cases have been many times cited as authority by the courts of that State, including the very recent case

of *Koch v. Streuter*, 232 Ill., 605, in which they are cited with approval, and this has been the rule in Illinois for three-quarters of a century.

In 1893, in the case of *Lancaster v. Roberts*, 144 Ill., 213, another action for specific performance, the court adopted the rule stated in 3 *Fry, Spec. Per.*, Sec. 440, as follows:

“Whenever the contract is incapable of being enforced against one party, that party is equally incapable of enforcing it against the other, though its execution in the latter way might in itself be free from the difficulty attending its execution in the former.”

In 1895, in *Vogle v. Pekoc*, 157 Ill., 339, the court said:

“Here the contract implies no obligation on one of the parties, and hence it is void for want of mutuality. The contract being void, it will not be necessary to inquire whether the amount which it was provided might be retained was penalty or liquidated damages.”

In 1898, in *Welty v. Jacobs*, 171 Ill., 624, a suit to enjoin the breach of a contract, the court distinguished the English case of *Lumly v. Wagner*, and reiterated the doctrine announced in *Chicago, etc., Co. v. Town of Lake*, *supra*, and in the opinion, used these words:

“While there was a negative covenant in the contract under consideration against Welty, it is not important to consider whether or not appellant might have been enjoined from performing elsewhere than at Jacob's theater at the time in question. For it is manifest that he could not have been compelled to perform at said theater.

“Before a contract will be specifically enforced, there must be mutuality in the contract, so that it

may be enforced by either; and, as this contract was of such nature that it could not have been specifically enforced by appellee, Jacobs, it should not be so enforced by appellant."

In 1899, in the case of *East St. Louis Con. Ry. Co., v. City of East St. Louis*, 182, Ill., 433, another injunction case, in refusing the relief sought, the court said:

"The court will not decree specific performance of a contract grossly unequal in its terms, nor where the complainant has been guilty of laches, and by lapse of time such changes in conditions have taken place as to make the enforcing of performance an injustice."

In 1904, in *Bauer v. Lumaghi Coal Co.*, a suit to enforce specific performance of a contract, the court said:

"One can not read the contract in this case without being impressed with the fact that it was so worded that if, in the future, the coal business should prove profitable, and Rupprecht or his assigns could gain an advantage by taking an easement, then they would have a right to demand it, and could compel Bauer to convey, but, if the coal business did not open up favorably, and it would be no advantage to Rupprecht, then Bauer would have no right to compel a specific performance, and would be powerless to enforce Rupprecht to do anything. It was therefore lacking in that element of mutuality required under the decisions above quoted, and therefore could not be specifically enforced in a court of equity."

The above case is especially pertinent here for the reason that the same motive which inspired the "want of mutuality" in that contract is identical with the motive which prompted the "second party" in these contracts to endeavor to bind the "first party" for a period of five years, while he remained free to proceed or to abandon

the enterprise at any time as future developments might warrant. It was a gamble upon the result of exploration which might be made by others, without incurring the usual gambler's risk upon the part of the "second party."

Many other cases of like import might be cited, but these are enough to show what the established rule in Illinois was long before the contracts here in controversy were executed. And when these contracts were entered into, the law of Illinois, thus established, was read into them, and was as much a part of them, as if it had been written into them in words.

This feature is emphasized in the case of *Kuhn v. Fairmount Coal Co.*, 215 U. S., 349. In the opinion rendered in that case, among much else of like character, the court, by Mr. Justice Harlan, said:

"At all events, the decisions of this court are numerous that the laws which prescribe the mode of enforcing a contract, *which are in existence when it is made*, are so far a part of the contract that no changes in the laws which seriously interfere with that enforcement are valid, because they impare its obligation, within the meaning of the Constitution of the United States. *Edwards v. Kearzey*, 96 U. S., 595."

In the same opinion, the court also said:

"Where, *before the rights of the parties accrued*, certain rules relating to real estate have been so established by state decisions as to become rules of property and action in that state, those rules are accepted by the Federal court as authoritative declarations of the law of the state." (The italics are by the court.)

As Applied to Oil and Gas Contracts.

The first expression of the Supreme court of Illinois

on this subject in relation to an oil and gas lease, was in the case of *Watford Oil and Gas Company v. Shipman, et al.*, 233 Ill., 9, 84 N. E. Rep., 53, in which it was held that a lease of the character of these here in controversy, is not enforceable in a court of equity at the instance of the lessee.

On the same day, February 20, 1908, in the case of *Poe v. Ulry*, 233 Ill., 56, 84 N. E., 46, the same court refused to cancel a lease of this character in a suit brought for that purpose by the lessor.

Later, in the case of *Cortelyou v. Barnsdall*, 236 Ill., 138, 86 N. E. Rep., 209, the court did cancel a lease of this character in an action brought for that purpose by the lessor.

Still later, in the case of *Ulry v. Keith*, 237 Ill., 284, 86 N. E. Rep., 696, the same court refused to enforce a lease of this character in an action brought by the lessee.

At first blush, it would seem that there is a sharp conflict among these decisions, especially so between the Poe-Ulry case and the Cortelyou-Barnsdall case. But this apparent conflict vanishes when the question of *vested rights* is considered. The distinction between these cases rests upon the well established rule that a lease of this character vests in the lessee no present title or estate either in the soil or in the oil and gas in place; that title to the oil and gas is inchoate and contingent upon their being found; that the finding of oil or gas is a condition precedent to the vesting of any title, but, *when found*, the right to produce becomes a *vested right*.

In the Cortelyou-Barnsdall case, no possession had been taken and the lease was held to be a mere license or option which could be revoked at any time before something was done, binding the lessee to exercise the option; while in the Poe-Ulry case, the inchoate estate had become absolute by performance resulting in the finding of gas,

and the right to produce thus became a vested right, of which the lessee could not be divested at the instance of the lessor.

In the Watford case and the Ulry-Keith case, the lessees were the complainants. They, as actors, went into a court of equity asking affirmative relief, basing their demand upon the leases which they held. In the Watford case no possession had been taken of the premises, and in the Ulry-Keith case, gas had been found and the terms of the lease complied with. In each case, the court refused to grant the relief sought, because the lease was inequitable in that it lacked mutuality.

Construing these cases together, the rule in Illinois seems to be:

1. Where the lessee has acquired no vested estate by performance, a lease of this kind will be cancelled in an action brought for that purpose by the lessor.—*Cortelyou v. Barnsdall*, *supra*.

2. Where the lessee has acquired a vested estate by performance, the lease will not be cancelled in an action brought for that purpose by the lessor.—*Poe v. Ulry*, *supra*.

3. Leases of this character will not be enforced in a court of equity at the instance of one not bound by its provisions, no matter whether there has or has not been performance, but the court will leave the parties where it found them.—*Watford Oil Co. v. Shipman*, *supra*, *Ulry v. Keith*, *supra*.

The case of *Brewster v. Lanyon Zinc Co.*, 140 Fed. Rep., 801, was cited in the court below by petitioners' counsel with some show of confidence. That case, however, announces no doctrine upon this point different from the rule in Illinois. It is in harmony with the Poe-Ulry case, and not in conflict with the Cortelyou case, the Watford case or the Ulry-Keith case. That was an action

brought to *cancel and annul* the lease after the lessee had acquired a vested estate by performance, as was true in the Poe-Ulry case, and not an action brought to *enforce* a lease by one not bound to perform a single provision it contained, as was true in the Watford case, the Ulry-Keith case and the cases at bar.

It might be remarked in passing, that in the Brewster case, the lessee had complied with every express covenant, even to the extent of completing a well and paying for the product thereof, and yet, notwithstanding the usual reluctance with which equity exacts a forfeiture, the court cancelled that lease for a lack of diligence in properly developing the premises. In other words, for a breach of an *implied condition* requiring the lessee to develop the premises to a greater extent than was required by the express terms of the lease.

Not only so, but that court recognized as sound, the very rule for which we are now contending, and on page 812, cited in support of that rule, *Marble Company v. Ripley*, *supra*, *Express Co. v. Railroad Co.*, *supra*, *Federal Oil Co. v. Western Oil Co.*, *supra*, and *Rust v. Conrad*, *supra*.

In the case of *Cortelyou v. Barnsdall*, *supra*, the court very clearly defined the legal status of leases of this character in the State of Illinois. In the opinion holding the lease void, the court said:

"A lease for mining for oil and gas, which grants to the lessee the right to mine for oil and gas so long as the same is produced and the royalty and rentals are paid, but which does not bind the lessee to perform any obligation, is a mere option which the lessor may withdraw before the lessee has done some act by which he binds himself to exercise the option."

In the case of *Watford Oil and Gas Co. v. Shipman*,

supra, the court, in defining the character of property of oil and gas *in situ*, said:

"Oil and gas, while in the earth, unlike solid minerals, are not the subject of ownership distinct from the soil, and a grant of the oil and gas, therefore, is a grant, not of the oil that is in the ground, but of such part thereof as the grantee may find, and passes nothing which can be the subject of an ejectment or other real action."

In the case of *Poe v. Utry, supra*, in further defining oil and gas as property, and the force and effect of leases of this character, said:

"A grant of oil and gas on certain lands is a grant of such oil and gas as the grantee may find there, and he is not vested with any estate in the oil and gas until it is actually found, since on account of their wandering nature and their liability to escape, or be withdrawn to other lands, they are not subject to absolute ownership."

The case of *Utry v. Keith, supra*, is a leading case on "oil and gas law" in the State of Illinois. In a very searching and elaborate opinion, the Supreme court of that State reviews the authorities on the subject, not only of that State, but in other jurisdictions, and while expressing satisfaction as to the established rules in that State, the court also placed the holding upon the ground of *stare decisis*. On this point the court said:

"There are also cases holding a different view. But however that may be, the question is so thoroughly settled, and by such a uniform line of decisions in this State, that we would not feel at liberty to adopt a contrary view if we felt disposed to do so."

From the foregoing it will be seen that the Supreme court of Illinois has determined the legal status, not only

of oil and gas as "property," but has announced "rules of property peculiar to mining leases in that State, which the Federal courts will recognize and follow." Thus, the words of the court in the Federal Oil Co. case, *supra*, are especially applicable here:

"The nature of property in natural gas and oil contained in the earth, and the legal effect of the instrument here in question, have been authoritatively settled by the ruling of the Supreme Court of Indiana"—Illinois.

The Federal Rule.

Not only have the controlling questions in these cases been settled by the highest court of the State of Illinois, but they have likewise been determined by the Federal court in that jurisdiction, as well as elsewhere.

In the decision of the cases at bar by the Circuit Court of Appeals for the Seventh Circuit, the result was based wholly upon the decision in the case of *Federal Oil Co. v. Western Oil Co.*, 121 Fed. Rep., 674. After analyzing the leases in these cases and comparing them with the lease involved in the Federal Oil case, the court said:

"Inasmuch, therefore, as there is no substantial distinction between the present cases and the Federal Oil Co. case, the decree of the Circuit Court must be reversed, and the causes remanded to the District Court for the Eastern District of Illinois, with direction to dismiss the bills of complaint for want of equity."

An examination of the Federal Oil Co. case will disclose the fact that the decision in that case rests on principles announced by the Supreme Court of the United States in *Ohio Oil Co. v. Indiana*, 177 U. S., 190, *Marble Co. v. Ripley*, 10 Wall., 339, 359, *Kerrick v. Hannaman*, 168 U. S., 328, 336, *Kelsey v. Crowther*, 162 U. S., 404,

So. Express Co. v. The Western Union etc. Co., 99 U. S., 191, as well as many cases in Federal courts of other jurisdictions which were cited in the opinion.

Thus it will be seen that every court of last resort—both State and Federal—having jurisdiction in the State of Illinois, had settled the controlling questions in these cases long before the leases in controversy were executed, and it must be conclusively presumed that these contracts were made with reference to the *lex loci contractus*. And yet, this court is asked to strike down all of these decisions upon the faith of which property rights and contractual relations have been created and established and by which human conduct, for generations, has been controlled.

Not only so, but this court is asked to create within the State of Illinois rules of property whereby citizens of other States may be granted rights and remedies which must be denied every citizen within that State. Assuming, which is not unreasonable, that ninety percent of all leases of this kind on lands within Illinois are held by citizens of that State, and must, of necessity, be governed by the laws with reference to which they were executed, the remaining ten percent would be given a potency which they did not have when they were obtained, but which would be acquired merely by their having been transported beyond the boundary of the State in which they have their *situs*. All this is asked of a court of equity, and in the name of "Even-handed Justice!"

In our contention that the decisions of the highest court of the State of Illinois governing contracts of this character establish rules of property in that State which the Federal court in that jurisdiction should recognize and follow, our friends on the other side of these cases concur. In their brief filed in the court below, they say:

"We might call attention, in passing, to the fact that the decision in *Poe-Ulry*, *supra*, being a decision in reference to a right in property,—a title to lands,—this rule would seem to be binding upon the Federal court; but as the decision of the Supreme Court of Illinois is, upon this point, in harmony with the Federal rule, as shown in the *Brewster* case, further discussion upon this point would be idle."

In this we most heartily concur. The rule in the *Poe-Ulry* case is, on this point, in harmony with the *Brewster* case. We might add that the rule in those cases is also in harmony with the decisions in the *Watford* case, the *Ulry-Keith* case and the *Cortelyou* case. They are in perfect consonance,—no discord, no conflict whatever. The former were actions brought by the *lessor* to *cancel* and *annul* the lease,—to have it declared void after the lessee had acquired a *vested estate by performance*—by the finding of gas. The relief sought was refused by the Supreme Court of Illinois in the *Poe-Ulry* case, and likewise by the Federal court in the *Brewster* case on these grounds. In the *Cortelyou* case, however, which was likewise brought by the lessor to annul and cancel the lease, the relief was granted,—the lease was held to be a mere license which the lessor may withdraw before the lessee has acquired a vested estate by performance.

We think, as do our friends on the other side of this case, that the decision of the Supreme court in the *Poe-Ulry* case does establish a rule of property in the State of Illinois which would doubtless be followed by the Federal court in this jurisdiction, if the same question were presented. This being true, do not the decisions in the *Watford* case, the *Ulry-Keith* case and the *Cortelyou* case also establish a rule of property in the State of Illinois, which the Federal court will likewise follow? In the *Watford* case and the *Ulry-Keith* case the question was iden-

tical with the cases at bar, and was presented in the same manner,—by the lessee seeking to enforce the lease by enjoining its breach. In fact, it was conceded in the trial of these cases that these cases were dismissed in the State court in which they were originally brought, to avoid the rule established by the Supreme Court of Illinois in the case above referred to.

We would not charge our friends on the other side with being so inconsistent as to contend that the decision in the Poe-Ulry case establishes a rule of property in that State, while the decisions in the Watford case, the Ulry-Keith case and the Cortelyou case are not in the same category. Nor do we wish to appear absurd by claiming more for the latter cases, in this respect, than belongs to the Poe-Ulry case. If there is anything in that case establishing a rule of property that is applicable to the case at bar, public policy, as well as established precedent, requires that that rule be followed. And, likewise, if there is anything in the Watford case, the Ulry-Keith case or the Cortelyou case establishing a rule of property which is applicable to the cases at bar, the same regard for public policy and established precedent demands that that rule be followed in these cases. And since counsel on both sides of these cases are in harmony upon this point, further discussion would be idle.

A FEW MINOR POINTS.

“Expert Testimony.”

The petitioners base their action upon a written contract. The validity of that contract is to be determined by the court as a question of law. It is in no sense a question of fact. An invalid contract can not be rendered valid by proof of any fact. In determining the validity of a contract, the instrument itself must speak for itself.

No amount of evidence, except evidence as to what the law is, would be pertinent. And any rule of practice which admits the testimony of mere laymen for the purpose of instructing the court as to what the law is, is such a departure from all precedents as to amount to an innovation. And it was upon such testimony that the Master based his finding No. *Six*, and from which he deduced his conclusion of law No. *One*, that the leases in controversy are "valid, enforceable contracts, entered into for a valuable consideration, and binding between the parties."

This is the only answer we care to make to the attempt of petitioners to prove, by "expert testimony" that they have a valid contract.

As to Department Leases on Indian Lands.

In their petition for a writ of *certiorari* in these cases, and also in their brief in that behalf, counsel volunteer the information, among other things of like character, that "the same surrender provision is contained in the oil leases issued by the Interior Department when leasing Indian lands for oil and gas purposes."

Counsel, however, fail to observe the requirements of Section 3, of Rule 21 of this court, in that they fail to refer to the page of the transcript where confirmation of this statement may be found. The same is true of the statement in the same connection, that: "The enforceability, not to say validity, of very many thousands of iron, coal, gas, and oil leases hang in the balance."

There seems to have been a tendency upon the part of the petitioners, throughout the progress of these cases to deal with abstract, or assumed, if not fanciful questions and conditions, rather than those that are real—those that, in fact, exist. This is on a level with the theory upon which a great mass of so-called "expert testimony" was admitted, and in harmony with finding No. 6 of the

Master's report in which none of the things described or conditions stated have any reference to these cases, but are purely theoretical and based on conditions said to exist in "many parts of the country."

If this reference to "the oil leases issued by the Interior Department," and to the "many thousands of iron, coal, gas, and oil leases," which it is said, "for many years have contained the provision which the Circuit Court of Appeals of the Seventh Circuit has in this case held fatal to their enforcement by injunction," is intended as an argument in favor of the validity of the leases involved in these cases, because of the great number of leases in which this infirmity is said to appear, then we would ask, what would be the legal *status* of the leases here involved if this infirmity appeared in none other? If this infirmity will render two leases void, in how many must it be used in order to neutralize its baleful effect?

It is true that a large percentage of the oil and gas leases in this country contain a "surrender clause" or some other provision of like character by which the lessee may escape liability in case of failure to develop the premises. It is also true, as shown by the public records of the counties in which oil is found, that only a small fraction of leases taken are operated by the original lessees. None of the leases disclosed by the transcript in the cases at bar, are held by the original lessees. This shows that leases of this character are taken by persons who have no intention to operate under them, but who obtain them purely to speculate upon. Prospective oil fields are overrun by "scalpers" who pre-empt the oil rights at a nominal cost by holding out to the land owner the hope of reward to come to him from development of the premises, and, if found, the production of oil and gas. These leases are then held to await future development in the vicinity,

and if by such development these rights become valuable, the leases are then sold to legitimate operators at a large price, and thus the speculator is enabled to intercept this increase in the value of the leaseholds at but little cost to him; but if development in the vicinity should fail to show the presence of oil or gas, then the leases are either allowed to lapse by their own terms, or are surrendered, thus enabling the speculator to gamble on the result of development by others, without capital invested and without risk or liability on his part.

It is of this class of leases that "many thousands" "hang in the balance." No legitimate operator needs a deceptive lease in order to successfully conduct his business. It is the business of the "scalper" only that is interfered with by applying to this class of contracts such rules as will require good faith and fair dealing. It is a marvelous commentary on any line of business to say that its success depends upon having a *hocuus-pocus* contract under which all sorts of chicanery may be practiced.

The rule for which we are contending has long obtained in all the great oil fields of this country,—in Pennsylvania, in West Virginia, in Indiana, in Illinois, in Oklahoma, in Texas and in California—in the latter state it is made so by statute,—and no legitimate operator has ever yet retired from the field on account of it. A different rule would be of advantage only to the speculator, and would place a premium on this class of leases by affording a more ready market and a higher price.

Mutuality of Remedy.

Counsel for the petitioners seem to assume that the only impediment to the enforcement of these leases is in the want of *mutuality of remedy*, due to the presence of the "surrender clause." In this relation, in their brief in the court below, counsel say:

"Practically Appellants' sole contention in this case is that appellees are not entitled to the relief prayed for, because the presence of the so-called surrender clause destroys mutuality of relief."

In this, counsel over-estimate the importance we attach to this branch of these cases. While the presence of the "surrender clause" goes far to impeach the fairness of these leases, it is by no means the paramount vice with which they are afflicted. They contain many features even more vicious than this. The studied wording of these instruments whereby pretenses are made to appear as promises, for the purpose of deceiving their inexperienced victims; the entire want of any obligation assumed by the lessee to carry out the purposes expressed; the power given the lessee to withhold the consideration which prompted their execution by holding the premises dormant for the purpose of gambling upon the result of development in the vicinity, without assuming the gambler's risk,—all these, together with the "surrender clause" as a contributing element,—make these leases a "snare and delusion for the entrapment and injury of the unwary land owner," and render them unworthy to be called, if indeed, they are, a contract, and unfit to be enforced in any court, especially in behalf of those who have availed themselves of every undue advantage they afford.

Nor do we contend that "*mutuality of remedy*," which is essential to the granting of relief in equity, means that both parties shall have the same kind and quality of remedy. But we do contend that both parties must have some remedy of some kind—each must be able to enforce the contract in some manner, as against the other. While in these contracts, there is no promise of any kind upon the part of the second party, except to pay the pittance called "rental," which is, in fact, pen-

alty, and under the surrender clause, even this may be defeated, thus rendering the lessor powerless to enforce these contracts in any manner except at the will of the lessee.

AS TO THE "STIPULATION."

The complainants filed in the court below, what they denominate a "stipulation," wherein they recite, in substance, that the purpose of the "surrender clause" was to enable them to avoid liability for the payment of the so-called "rental" in the event that it should be determined, within the term of the lease, that the premises were valueless for oil purposes. But, they say, inasmuch as it has been proven that the premises are oil producing, and the reason for the surrender clause has ceased to exist, they are now willing to expunge that part of the contract. In other words, they say, in effect, we prepared this lease in this manner and inserted this clause for the purpose of enabling us to avoid all liability, in case the premises should be proven to be non-producing, and at the same time to enable us to reap all the benefit in case the premises should be proven to be oil-producing. The purpose, in short, was to have the lessor to carry all risk of the premises being "dry," and to enable the lessee to reap all benefit, in case the premises should become valuable as oil property.

This, too, is an innovation. It amounts to a confession of the very thing to which this whole transaction so unerringly points. In effect it says, although this lease purports to have been given "for the sole and only purpose of mining and operating for oil and gas," this, in fact, was not the purpose for which it was procured. It was obtained for the purpose of speculation. If this was not its purpose, why the necessity for this "surrender clause" in order to escape the payment of rental? This

"rental" is payable only until a well is completed, and nine months were given in which to complete a well during which time no rental was to be paid at all. If the lease was taken in good faith for the purpose expressed in it,—for the purpose of "mining and operating for oil and gas,"—no surrender clause was necessary in order to avoid the payment of rental. A compliance with the express purpose of the lease,—the completion of a well at any time,—would accomplish the same purpose and how could they "mine and operate for oil and gas" without completing a well? This admission, then, in this "stipulation" clearly demonstrates that the real purpose in obtaining these leases was not the purpose expressed in them, but was speculation.

And further, by this "stipulation" they, in effect, say: Now, since all hazard is past, and we have had the benefit of this surrender clause all of these years, during which time we could have availed ourselves of it at any time, and during which time the premises have been made amazingly valuable by the skill, energy, enterprise, labor and money of others, none of which were we willing to risk,—not even the 25 cents a year without reserving the right to avoid it,—and, while we were thus masquerading, by the grace of others, the conditions have outgrown our lease, we now propose to so amend our contract as to make it fit these changed conditions, by striking out of it that provision which we have shown, by "expert testimony" is so necessary to have in it. Perish the thought! Is this surrender clause essential only so long as it serves their purpose, and may they thus, by an *ex parte* motion cast it aside when it becomes a boomerang? Because this contract binds them to do nothing and to pay nothing, except at their own election, are they, at this time, in the light of these changed conditions, to have the further privilege of amending it at their pleasure, to suit present condi-

tions? If this provision is so essential to a contract of this kind, even for the purpose of operating, as some of the experts say it is, why this anxiety to get rid of it,—why thus emasculate this lease?

Are they to be permitted to thus “blow hot and cold with the same breath?” After all, is this “expert testimony” merely for the purpose of casting sand over a “Serbonian Bog” to make it appear as solid land, in order to entrap and engulf the uninformed, but into which they, themselves, have fallen? In their effort to escape the “Cliffs of Seylla” have they not plunged into the “Vortex of Charybdis?”

In resenting a proposition of this kind, the United States Supreme Court, in the case of *Hollingsworth v. Fry*, 4 Dall., 345, by Mr. Justice Patterson, said:

“In cases of this kind, equity will not suffer a party to lie by till the event of the experiment shall enable him to make his election with certainty of profit one way, and without loss any way. This mode of procedure is unfair, contrary to natural justice and in exclusion of mutuality.”

And in the case of *Twin-Link Oil Co. v. Marbury*, 91 U. S., 593, 23 Law Ed., 328, 331, the same court, by Mr. Justice Miller, said:

“The fluctuating character and value of this class of property is remarkably illustrated in the history of the production of oil from wells. Property worth thousands today is worth nothing tomorrow; that which today would sell for \$1,000, as its fair value, may by the natural changes of a week, or the energy and courage of desperate enterprise, in the same time may be made to yield that much every day. The injustice, therefore, is obvious of permitting one holding the right to assert an ownership in such property to voluntarily await the event, and then decide, when

the danger which is over has been at the risk of another, to come in and share the profits.

“While a much longer time might be allowed to assert this right in regard to real estate whose value is fixed, on which no outlay is made for improvement, and but little change in value, the class of property here considered, subject to the most rapid, frequent and violent fluctuations in value of anything known as property, requires prompt action in all who hold an option whether they will share its risks or stand clear of them.”

AS TO THE MASTER'S REPORT.

A Few Observations.

Since the petitions herein, as well as the briefs of the petitioners, make frequent reference to the Master's report and contain numerous quotations therefrom, as authority in support of their theory of these cases, and in view of the fact that this report was adopted as the findings of the trial court, upon which the Decrees were based, it may not be amiss to note a few of the inaccuracies, false premises and erroneous conclusions contained in this report, in order to test its value for any purpose.

As to "Large Blocks" of Leases.

Much "expert testimony" was admitted by the Master, not only to show that the leases involved are valid, equitable and enforceable, and that in order to successfully operate for oil and gas, it is necessary to have in the lease a "surrender clause," but it was also shown by the same class of testimony that it is likewise necessary to hold leases on large bodies of land, and that no one would engage in the business of "producing" without such holdings. The record discloses, however, that the entire hold-

ings under the Walton leases did not exceed one hundred acres. According to the "experts," then, these leases were not procured in good faith for the purpose of "operating," but for some other purpose.

However, in line with this "expert testimony," in order to justify the "surrender clause," the Master finds that, "If he (the lessee) has a small amount of territory, and should discover oil near the edge of his block of leases, other operators can lease the adjacent lands, and obtain the substantial benefit of his operations."

Without considering this deduction from a legal or equitable point of view, from a physical standpoint it presents an anomalous situation. To avert a calamity of the sort depicted by the Master, it would be necessary to procure a "block of leases" without any "edge," or "adjacent lands," because the Master finds that "the presence of oil and gas can only be ascertained to a certainty by drilling," and if this "drilling" should show the presence of oil or gas "near the edge" of a *large* "block of leases," this same calamity, thus intensified, would follow. And since the Master has not enlightened us upon this point, we are left to conjecture only, as to what would be the limits of a "block of leases" that would avoid the disaster contemplated by this finding.

As another reason "which has rendered it *customary* for oil operators to secure as large a block of land as possible," the Master finds that "In many parts of the country it has been found impractical to drill in the winter or spring on account of the impassable condition of the country roads for heavy traffic."

The relevancy we do not see. But, since the Master has so found, we must conclude that, since "a large block of land" was not secured in this instance, the condition of the "country roads" in Crawford County, Illinois, was satisfactory, and that the "*many parts of the country*"

referred to was not intended to include the region of the lands in question, unless, forsooth, it may be said that the same reason has rendered it "customary" to secure *small* blocks of land in Illinois. The same reason is also assigned for the "custom" of placing a provision in the lease "for either the drilling of a well or the paying of the rental, in case of failure to drill."

If the purpose of this finding in relation to the condition of the country roads "in many parts of the country" is to excuse or justify the petitioners in their failure to make the development contemplated by the leases in these cases, then the answer is that it has not been continuous "winter" or "spring" since the 22nd day of May, 1905, as the Master knows by physical experience, if not judicially. The condition of the country roads "in many parts of the country" was no barrier to those who acted in good faith. H. E. Wilcox found a way to complete a well on premises in the vicinity in the *spring* of 1906, within sixty days after he had procured his lease; Little & Willett completed two wells upon these premises and other wells on adjoining lands in the *winter* of 1906-7 after procuring their lease in September of that year, and these defendants have since completed ten wells, making in all twelve wells that were completed on these premises, while the petitioners did nothing, during all of which time they held a lease upon the premises which was given "for the sole and only purpose of mining and operating for oil and gas."

As to the "Surrender Clause."

But further as to this report: In said finding No. Six, the Master finds that "The object of the surrender clause is to allow the operator to cancel his block of leases, or any portion thereof, at any time." This is self-evident. He further finds that the "land may be tested and found unproductive of oil and gas, and the land can then be

surrendered to the owner." This is likewise self-evident. But how may the land be "tested?" The Master finds that the presence of oil or gas "can only be ascertained by drilling." The same finding also states that "the rental keeps on accruing until the time of the *drilling of a well*, or the cancellation of the lease, and in a large block of leases, the expense of paying rental amounts to a great deal." The finding also states that the "object of the lease is to *explore* for oil and gas."

If this be true, what is the use of a "surrender clause," in order to avoid the payment of rentals? When this "object" has been accomplished—when the test is made—when exploration is begun—when a well is completed—this "rental" ceases by the terms of the lease without any surrender. This "surrender clause," then, can be of service only when the "object of the lease" is not to be complied with—when no "testing" is to be made—when no well is to be "completed"—when the lease is to be held, not for the purpose of "drilling" but for the purpose of speculation.

It must be plain to any rational mind that a lease taken in good faith for the purpose of "mining and operating" has no need of a surrender clause. And while many leases containing a clause of this kind are purchased and owned by persons who operate under them in good faith, the same would be true without such a clause. This "surrender clause" is simply an invention of the speculator whose purpose is to tie up as many tracts of land as possible to be held dormant awaiting development in the vicinity by others, in order that he may gamble on the result of such development without risk or liability on his part.

Under such a form, the unscrupulous speculator is enabled to obtain a lease from the confiding land owner for the ostensible purpose of "mining and operating for

oil and gas," for the pretended consideration of the prospective oil royalties and gas rentals to come from development and production, and then convert it into a lease for an entirely different purpose, whereby the lessor is deprived of the consideration which induced the execution of the lease, and is prevented, not only from operating upon his premises himself, but also from procuring another to do so, while the lessee, by a mere trick, has secured to himself all the advantage to be gained by the finding of oil or gas in the vicinity, without cost to him. It is a fraud of this sort that the complainants are seeking to justify by their "expert testimony," their "stipulation," their reference to "large blocks of leases," and to the condition of the country roads "in many parts of the country." And it was to silence a pretense of this sort that Judge Brawley, in the case of *Huggins v. Daley*, *supra*, so aptly said:

"The proof is clear that he never intended to drill a well within the time stipulated. And the proviso was written by the lessee evidently for the purpose of deception. He knew that the object of the lessor was to secure diligent search for oil, and he was 'keeping the word of promise to the ear, and breaking it to the hope,' skillfully turning it into a mere speculative lease, binding the lessor, and leaving himself free. It would be unconscionable to hold the lessor bound. 'Law, as a science, would be unworthy of the name, if it did not, to some extent, provide the means of preventing the mischiefs of improvidence, rashness, blind confidence and credulity on the one side, and of skill, avarice, cunning, and gross violation of the principles of morals and conscience on the other.' "

And yet, the Master concludes that, "Since the object of the lease is to explore for oil and gas, it does not appear

that after the field has been *tested* and found *unproductive*, that the presence of the surrender clause is an inequitable provision." If the field had, in fact, been found "unproductive," would the petitioners then have tendered their "stipulation" renouncing all benefit of this "surrender clause?"

To what "field" does the Master refer? The petitioners have "tested" no field. The "field" in question in this case, was tested by others. May the petitioners appropriate the enterprise of these respondents in order to excuse a non-compliance with the express purpose of their lease? May their default be thus condoned?

Nor was the field in question found to be "unproductive." In the field involved in this case, none of the conditions described by the Master are shown to exist. And yet, upon the conditions said to exist in "many parts of the country," as stated in his finding No. *Six*, the Master bases his conclusion of law No. *One*, "That the oil and gas leases entered into between M. A. Walton and James A. Smith and Susannah Smith on the 22nd day of May, A. D., 1905, are valid, enforceable contracts, entered into for a valuable consideration, and binding between the parties."

It is marvelously strange, indeed, if all of the courts that have passed upon these questions during the last half century, with their combined learning, wisdom and experience, are *wrong*, and the Master alone is *right*.

Offsetting Infirmities.

One can not read the Master's report without being impressed with the fact that it was made under a misconception of the law as well as the facts in this case. To verify this statement, one needs to look only to his argument in support of his conclusions.

In reference to the rule that a court will not enforce

a contract wanting in mutuality at the instance of one not bound by its provisions, after noting the fact that the lease owned by the respondents also contains a surrender clause, the Master, on page 17 of his original report (page 441 of the Record) says:

“That this rule would be followed between two rival lessees or assignees of such leases, each claiming under a separate lease containing the same vice or infirmity, to the Master seems exceedingly doubtful.”

Thus, it appears that the Master had offset “infirmities.” Apparently drawing his inspiration from the argument in the brief filed before him by the petitioners herein, he seems to think that the “vice and infirmity” in the lease sought to be enforced, is cured by a like “vice and infirmity” in a lease which no one is seeking to enforce. Not only so, but he does not take into account the fact that the “vice and infirmity” contained in the lease not in question in this case, was cured by active, effective and good faith performance—the very performance which was sought to be enjoined in this case, by those who base their right of action upon a lease in which this “vice and infirmity” has not been cured. If, then, the validity or enforceability of the lease sought to be enforced in this case could be determined by comparison in this manner, the conclusion would fail because the premises are not sound.

Illinois Cases Distinguished (?)

Again in this connection, in seeking to distinguish the Illinois cases from the cases at bar, the Master says:

“Both the Illinois cases, viz: *Watford Oil and Gas Co. v. Shipman*, 233 Ill., 9, and *Ulry v. Keith*, 237 Ill., 284, that have passed upon this point have been cases wherein the suit was between the lessor and the lessee, in which case the rule therein declared would doubtlessly apply.”

And further, the Master on this point says:

"If, then, the presence of the surrender clause in the lease is a bar to complainants' suit for injunction, it must be because the owner of the land, the complainants' lessor, is a party to the suit. He is, however, while probably a necessary party, only a nominal one, and the relief required against him is not of such a character that it could be said that he was enjoined from violating his contract with the complainants."

This reasoning is erroneous both in point of fact and law. In point of fact, in the cases referred to, the suits were no more between the lessor and the lessee, than are the cases at bar. They were, in fact, and to all intents and purpose, between rival lessees. If the lessors are but nominal parties in these cases, they were equally so in the cases referred to. In the Watford case, the writer was of counsel for L. G. Neely and others, who were subsequent lessees, and they were the principal defendants in both courts. The complainant was a prior lessee who brought the action against the lessor and the subsequent lessee to enjoin operation on the premises under a subsequent lease, as a reading of the decision will show.

The Ulry-Keith case was also one between rival lessees. The action was brought by a prior lessee against the lessor and one Everett Keith, a subsequent lessee, to enjoin an alleged trespass by the subsequent lessee. The bill alleged that the owner of the land had entered into an agreement with one Everett Keith by which the said Keith was to drill on the premises for oil and gas, and that he had entered upon said premises with a rig and drilling outfit, and was proceeding to drill a well for the production of oil and gas, and declared his purpose and intention, if he found oil and gas in paying quantities, to convert the same to his own use, and this would

be an irreparable damage to the complainants. It was this alleged trespass that was sought to be enjoined.

While the owner of the land was made a party in each of the cases referred to no affirmative relief—no personal judgment—was asked against them by way of an accounting and the recovery of money, as is true in the cases at bar. If the owner of the land was not enjoined “from violating his contract” in the case at bar, it would be interesting to know upon what theory he was enjoined at all, and if merely a nominal party, as stated for the purpose of the distinction sought to be made by the Master, how can he justify the judgment in *personam* which he recommends?

The Master's error as to the facts in the cases referred to by him must be due to the fact that he received his information second hand, and with such a meagre knowledge of those cases and the decisions rendered, it is difficult to see how he could, with any degree of accuracy, conclude that they do not apply to the cases at bar. The case of *Federal Oil Co. v. Western Oil Co.*, *supra*, decided by Judge Baker, and the same case decided by the Circuit Court of Appeals, was also between two rival lessees, and in which the rule was applied. These cases, with many others of like character were cited before the Master, and if read, should have set him right upon this subject.

The legal conclusion stated by the Master is equally erroneous. The reason for the rule that such contracts will not be enforced in favor of one not bound by its provisions, is not because the parties to the contract are parties to the suit, but it is because of the inherent infirmity of the contract itself, which operates upon him who bases his demand for relief upon a contract by which he, himself, is not bound. This infirmity renders such a contract impotent in the hands of him who seeks to enforce

it in a court of equity; it furnishes no basis upon which to demand equitable relief against any one.

"Contract Relation."

In this relation, on page 17 of his original report, (page 441 of the Record) the Master says:

"There is no contract relation between the rival lessees. So far as either of them is concerned, the prior lease has the better title. There is no relation between them, whereby the question of specifically performing anything could possibly exist. Between them, it is simply a question of which one, as against the right of the other, is a trespasser."

This reasoning of the Master that, because there are no "contract relations" existing between the complainants and certain of the defendants, the complainants are thereby relieved from showing a meritorious cause of action—a right to the relief demanded—is so glaringly fallacious as to not merit notice except for its novelty.

Suppose, for illustration, that in a case like this, the complainant, having no lease or contract of any kind, but as a mere volunteer, goes into a court of equity to enjoin a trespass by one who likewise is without authority. Here no "contract relation" would exist between the parties, but would the complainant have any standing in court? Would the chancellor compare "infirmities" and finding them equal, hold that the want of a *right of action* is cured by the want of a *defense*?

In such a case, would it be necessary for the defendant to show a better right to the possession of the premises than the complainant has, and, failing in this, would the complainant prevail? Or would it not be incumbent upon the complainant to show the existence of a right violated, or threatened—a satisfactory title to the *locus in quo*—before he could be heard in a court of equity?

If such an action could not be maintained by one having *no* contract, would his case be different if based upon a *void contract*? Will a void contract, or one which is impotent as between the parties to it, support an action as against a stranger?

The Master's conclusion in this respect, is certainly a revelation, to say the least. He seems to think that in an action of this kind, *before relief should be denied*, there must not only be a contract relation existing between the parties but that relation must rest upon a void contract, or a contract which is not enforceable. And unless this paradoxical condition exists, the relief will be granted! Here are his own words in this respect:

"There is no contract relation between them that a court of equity could say is so lacking in mutuality as to bar a bill for specific performance, *and unless this element exists*, it does not appear on what grounds relief should be denied."

In other words, relief will be denied if there is a contract between all of the parties to the suit that "is so lacking in mutuality as to bar a bill for specific performance;" but if the complainant has such a contract with certain of the defendants only, or with some other person, or has no contract at all, then the relief will be granted! In this, in one sense, the Master is consistent, because this is the ultimate conclusion and final effect of his report. And upon this report, so wrought out, the decrees were based! And it is from this report that counsel quote as authority for the guidance of this court!!

One More Correction.

In his report, on page 23, (page 445 of the Record) after referring to certain cases in which relief by injunction was granted, where, by reason of the nature of the subject-matter of the contracts, specific performance could not be enforced, the Master says:

"A number of cases have been cited by the defendants, which, it is claimed, hold contrary to these, but in all cases, they were bills praying for specific performance, and not for an injunction against the breach of a contract."

This statement is inaccurate in more respects than one. In the first place, there was no claim by the defendants that the cases cited by them hold contrary to those referred to by the Master, because the cases referred to by him were radically different in character and in subject-matter from those cited by the defendants.

Since it seems that we were unable to make our position on this subject clear in the court below, we wish here and now to say with emphasis, lest we again be misunderstood, that we have never contended that in no instance will a contract be enforced negatively by enjoining its breach, which can not be enforced by the affirmative remedy. But what we do say is, that if because of the character of the contract itself, a court could not enforce it as against the complainant—the actor in the suit—if the action were reversed, because of a want of any obligation assumed, then the court will not enforce it as against the other party, either by decreeing its specific performance or by enjoining its breach. But if the contract be such as would be enforced against the complainant, but because of the nature of the *subject-matter*, it can not be specifically enforced as against the other party, then the negative remedy may be applied, if the equities of the case require it. The rule for which we contend is clearly stated in *Pomeroy's Equity Jurisprudence*, in Sec. 1314, thus:

"An injunction restraining a breach of a contract is a negative specific enforcement of that contract. The jurisdiction of equity to grant such an injunction is substantially coincident with its jurisdiction to compel a specific performance. Both are gov-

erned by the same doctrine and rules. It may be stated as a general proposition, that whenever the contract is of such a class, which will be affirmatively specifically enforced, a court of equity will restrain its breach by injunction, if this is the only practical mode of enforcement which its terms will permit."

Nor is it an accurate statement of the facts that all of the cases cited by the defendants "were based on bills praying for specific performance, and not for an injunction against the breach of a contract."

In our brief filed with the Master, we cited 19 authorities upon this proposition, none of which, but three—*Marble Co. v. Ripley*, *supra*, *So. Express Co. v. Western N. C. R. R. Co.*, *supra*, and *Rust v. Conrad*, *supra*—"were based on bills praying for specific performance." Among the cases to which attention was called, were *Watford Oil and G. Co. v. Shipman*, 233 Ill., 9; *Utry v. Keith*, 237 Ill., 284; *Welty v. Jacobs*, 171 Ill., 624; *Chicago, etc. Co. v. Town of Lake*, 130 Ill., 42; *East St. L. Ry. Co. v. City of E. St. Louis*, 182 Ill., 433; *Federal Oil Co. v. Western Oil Co.*, 112 Fed. Rep., 373,—by Judge Baker—and *Federal Oil Co. v. Western Oil Co.*, 121 Fed. Rep., 674—by The Circuit Court of Appeals; *Iron Age Pub. Co. v. Western U. Tel. Co.*, 83 Ala., 498; *Fowler Utility Co. v. Gray*, 168 Ind., 1, and others, all of which were clear-cut bills "for an injunction against the breach of a contract," as the cases themselves will show—the statement of the Master to the contrary, notwithstanding.

If we, alone, had been misunderstood by the Master, we would feel that we were at fault. But since all of the authorities cited were likewise apparently misunderstood, and were misapplied, we must conclude that this result was, at least, not wholly due to our failure to make our meaning clear.

We call attention to these matters, not because we

regard them as important within themselves, nor because we take pleasure in doing so, but in confirmation of our contention that the Master's report was made under a misconception of the law and the facts, and without the careful consideration which the importance of these cases would warrant, especially by one not familiar with the questions involved, and it is therefore wholly worthless as an authority, or for any other purpose.

And even so, if this report had not been adopted as the findings of the court below, we would have been disposed to pass it by unnoticed. But since it was so adopted, it became the decision of the trial court, and it is as such that we assail it here. By adoption, it became the foundation upon which the Decrees were predicated, and we would be derelict in the discharge of the duty we owe to ourselves, to our clients and to this court, did we not point out at least some of the inaccuracies, false premises and erroneous conclusions upon which the Decrees in these cases rest.

The pages of this argument have been multiplied by our endeavor to make ourselves understood here, and to place these cases before this court in their true light. And, to lighten the labors of the court in the examination of the authorities cited, we have copiously quoted from many of these authorities. If in these respects we have, in a measure, succeeded, we feel rewarded for our effort, and with confidence submit these cases.

Respectfully submitted by

JAY A. HINDMAN,

Solicitor for Respondents.

HARTFORD CITY, INDIANA.

November 1, 1913.

IN THE
Supreme Court of the United States

Nos. 409-410, OCTOBER TERM, 1913.

JOSEPH F. GUFFEY, <i>et als.</i> ,	}	No. 409.
vs.		
JAMES A. SMITH, <i>et als.</i> ,		
	<i>Petitioners,</i>	
	<i>Respondents,</i>	

AND

JOSEPH F. GUFFEY, <i>et als.</i> ,	}	No. 410.
vs.		
SUSANNAH SMITH, <i>et als.</i> ,		
	<i>Petitioners,</i>	
	<i>Respondents,</i>	

ON CERTIORARI TO THE CIRCUIT COURT FOR
THE SEVENTH CIRCUIT.

MOTION TO ADVANCE HEARING.

The Petitioners, through their attorneys, and with the full concurrence of counsel for the Respondents, respectfully move the Court to advance the above-entitled causes for argument for the following reasons:

The question involved is whether a Court of Equity will protect lessees under an oil lease which contains what is known as the "surrender clause" against subsequent lessees with notice.

This question is of very general public interest, because practically all oil leases throughout the country, including many entered into by the Government of the United States on behalf of Indians, contain this "surrender clause," and it is, therefore, important to a great industry that the rights of lessees should be known.

Certainly it is important that the Government of the United States shall know whether such contracts as are now made are enforceable in equity.

JOSEPH W. BAILEY,
J. H. BEAL,
Attorneys for Petitioners.

We join in the foregoing motion.

JAY A. HINDMAN,
ABRAM SIMMONS,
FRANK C. DAILEY,
Attorneys for the Respondents.

FILED.

JAN 18 1913

JAMES H. MCKENNEY,

— IN THE —

Supreme Court of the United States

Nos. ~~802 & 803~~, OCTOBER TERM, 1912

JOSEPH F. GUFFEY, A. S. GUFFEY, E. N. GILLESPIE, and
ROBERT PITCAIRN, JR., co-partners trading as
GUFFEY, GILLESPIE & PITCAIRN,
Petitioners,

v.

JAMES A. SMITH, J. W. SOLLEY, C. F. JOHNSON, WALTER
HENNIG, and THE OHIO OIL COMPANY,
a Corporation, Respondents,
and

JOSEPH F. GUFFEY, A. S. GUFFEY, E. N. GILLESPIE, and
ROBERT PITCAIRN, JR., co-partners trading as
GUFFEY, GILLESPIE & PITCAIRN,
Petitioners,

v.

SUBANNAH SMITH, J. W. SOLLEY, C. F. JOHNSON, WALTER
HENNIG, and THE OHIO OIL COMPANY,
a Corporation, Respondents.

BRIEF OF RESPONDENT, THE OHIO OIL COMPANY, OPPOSING PETITION FOR CERTIORARI

ABRAM SIMMONS,
FRANK C. DAILEY,
*Attorneys for Respondent,
The Ohio Oil Company.*

ABRAM SIMMONS,
FRANK C. DAILEY,
Bluffton, Indiana.

John W. Kern.

— IN THE —

Supreme Court of the United States

Nos.

OCTOBER TERM, 1912

JOSEPH F. GUFFEY, A. S. GUFFEY, E. N. GILLESPIE, and
ROBERT PITCAIRN, JR., co-partners trading as
GUFFEY, GILLESPIE & PITCAIRN,
Petitioners,

v.

JAMES A. SMITH, J. W. SOLLEY, C. F. JOHNSON, WALTER
HENNIG, and THE OHIO OIL COMPANY,
a Corporation, Respondents,
and

JOSEPH F. GUFFEY, A. S. GUFFEY, E. N. GILLESPIE, and
ROBERT PITCAIRN, JR., co-partners trading as
GUFFEY, GILLESPIE & PITCAIRN,
Petitioners,

v.

SUSANNAH SMITH, J. W. SOLLEY, C. F. JOHNSON, WALTER
HENNIG, and THE OHIO OIL COMPANY,
a Corporation, Respondents.

*BRIEF OF RESPONDENT, THE OHIO OIL COM-
PANY, APPOSING PETITION FOR CERTIORARI.*

*BRIEF OF CO-RESPONDENTS, CORRECT STATE-
MENTS OF THE LAW.*

The respondent, The Ohio Oil Company, respectfully
refers the court to the brief of its co-respondents, as con-
taining correct statements of the law as applied to this
proceeding.

It therefore requests that such brief be considered with the same force and effect as if reproduced and copied herein, the legal questions as to all of the respondents being identical.

This respondent believes that all the propositions presented by the petitioners have been fully and fairly met and answered by its co-respondents, yet it begs to enlarge upon the argument so made, and to submit some additional reasons, if possible, why the writ should be denied.

In order that a full understanding may be had of the real questions involved this respondent asks the privilege of producing *hec verba* the contract to be construed, except the names of the first party and the description of the land are omitted.

"THE CONTRACT.

AGREEMENT, Made and entered into the 22nd day of May, A. D. 1905, by and between _____ of Licking Township, Crawford County, and State of Illinois, party of the first part, and M. A. Walton, party of the second part,

WITNESSETH, That the said party of the first part for and in consideration of the sum of one dollar _____ in hand well and truly paid by the party of the second part, the receipt of which is hereby acknowledged, and the covenants and agreements hereinafter contained on the part of the said party of the second part, to be paid, kept and performed, ha— granted, demised, leased and let unto the party of the second part, — heirs, executors, administrators, and assigns, for the sole and only purpose of mining and operating for oil and gas, and of laying pipe lines, and building tanks, stations and structures thereon to take care of the said products, all of that certain tract situate in Licking Township, Crawford County, and State

of Illinois, bounded substantially as follows ——— and being the same land conveyed to the said first party by ———, reserving, however, therefrom 200 feet around the buildings on which no well shall be drilled by either party except by mutual consent.

It is agreed that this lease shall remain in force for the term of five years from this date, and as long thereafter as oil or gas, or either of them is produced therefrom by the party of the second part, their heirs or assigns.

IN CONSIDERATION OF THE PREMISES, The said party of the second part covenants and agrees: 1st, To deliver to the credit of the party of the first part ——— heirs or assigns, free of cost, in the pipe line to which it may connect its wells, the equal 1-8 part of all oil produced and saved from the leased premises, and 2nd, To pay \$100.00 per year for the gas from each and every gas well drilled on said premises, the product of which is marketed and used off the premises said payment to be made on each well within sixty days after commencing to use the gas therefrom as aforesaid, and to be paid yearly thereafter while the gas from said well is so used.

Second party covenants to locate all wells so as to interfere as little as possible with the cultivated portions of the farm. And, further, to complete a well on said premises within nine months from the date hereof, or pay at the rate of 25 cents per year quarterly in advance, for each additional three months such completion is delayed from the time above mentioned for the completion of such well until a well is completed; and is agreed that the completion of such well shall be and operate as a full liquidation of all rental under this provision during the remainder of the term of this lease. Such payment shall be made direct to the lessor or deposited to his credit in Exchange Bank, Martinsville, Illinois.

IT IS AGREED, That the second party is to have the privilege of using sufficient water from said premises to run all machinery necessary for drilling and operating thereon and at any time to remove all machinery and fixtures placed on said premises; and, further, upon the pay-

ment of one dollar, at any time, by the party of the second part, heirs or assigns, shall have the right to surrender this lease for cancellation, after which all payments and liabilities thereafter to accrue under and by virtue of its terms shall cease and determine, and this lease become absolutely null and void.

WITNESS, the following signatures and seals:

_____(SEAL.)

Witness, T. E. PIERCE,

(Tr. pp. 76-78.)

This respondent suggests that the writ should be denied for all the reasons stated in the brief of its co-respondents, and for the reasons:

FIRST.

The law, as declared by the court in its opinion in this case, is a correct enunciation of the law.

(U. S.) *So. Express Co. v. Western N. C. R. R. Co.*, 99 U. S. 191; 25 Law Ed. 319;

(U. S.) *Huggins v. Daley*, 99 Fed. Rep. 606; 48 L. R. A. 320;

(U. S.) *Federal Oil Co. v. Western Oil Co.*, 121 Fed. Rep. 674;

(U. S.) *Federal Oil Co. v. Western Oil Co.*, 112 Fed. Rep. 373;

(U. S.) *Reece v. Zinn*, 103 Fed. Rep. 97;

(U. S.) *Cold Blast T. Co. v. Kansas City, etc., Co.*, 114 Fed. Rep. 77; 57 L. R. A. 696, 699;

(U. S.) *Am. Cotton Co. v. Kirk*, 68 Fed. Rep. 791;

(U. S.) *Crane v. Crane Co.*, 105 Fed. Rep. 869;

(Ill.) *Weaver v. Weaver*, 109 Ill. 225;

- (Ill.) *Lancaster v. Roberts*, 144 Ill. 213; 33 N. E. Rep. 27;
- (Ill.) *Vogle v. Peakoc*, 157 Ill. 339; 42 N. E. Rep. 786;
- (Ill.) *Welty v. Jacobs*, 171 Ill. 624; 49 N. E. Rep. 723; 40 L. R. A. 98;
- (Ill.) *Chicago Mun. Gas Light Co. v. Town of Lake*, 130 Ill. 42; 22 N. E. Rep. 616;
- (Ill.) *East St. Louis, etc., Co., v. City of E. St. Louis*, 182 Ill. 433; 55 N. E. Rep. 533;
- (Ill.) *Cleveland v. Martin*, 218 Ill. 73; 75 N. E. Rep. 772;
- (Ill.) *Bauer v. The Lumaghi Coal Co.*, 209 Ill. 316; 70 N. E. Rep. 643;
- (Ill.) *Watford Oil and Gas Co. v. Shipman*, 23 Ill. 9; 84 N. E. Rep. 53;
- (Ill.) *Cortelyou v. Barnsdall*, 236 Ill. 138; 86 N. E. Rep. 200;
- (Ill.) *Ulrey v. Keith*, 237 Ill. 284; 86 N. E. Rep. 696,
- (Mich.) *Rust v. Conrad*, 47 Mich. 449; 41 Am. Rep. 720;
- (Ala.) *Iron Age Pub. Co. v. W. U. Tel. Co.*, 83 Ala. 493; 3 Am. St. Rep. 758;
- (W. Va.) *Eclipse Oil Co. v. South Penn. Oil Co.*, 47 W. Va. 84; 34 S. E. Rep. 923; 20 Mor. Min. Rep. 234;
- (W. Va.) *Snodgrass v. South Penn. Oil Co.*, 47 W. Va. 509; 35 S. E. Rep. 820;
- (La.) *Campbell v. Lambert*, 36 La. Ann. 35; 51 Am. Rep. 1;
- (W. Va.) *Steelsmith v. Gartlan*, 45 W. Va. 27; 28 S. E. Rep. 978; 44 L. R. A. 107;

- (Wis.) *Hoffman v. Maffioli*, 104 Wis. 630; 47 L. R. A. 427;
 (Tex.) *Nat. O. and Pipe Line Co. v. Teel*, 67 S. W. Rep. 545;
 (Ind.) *Fowler Utility Co. v. Gray*, 168 Ind. 1; 79 N. E. Rep. 897;
 (Ind.) *Gadbury v. Ohio, etc., Co.*, 162 Ind. 9; 67 N. E. Rep. 259; 52 L. R. A. 895;
 Donahue on "Petroleum and Gas," p. 155;
 Cyc. of Law and Procedure, Vol. 22, p. 950.

SECOND.

The law as declared by the court in its opinion in this case, is consistent with the rule of property in such cases, as established by the Supreme Court of the State of Illinois.

- (Ill.) *Ulrey v. Keith*, 237 Ill. 284;
 (Ill.) *Watford Oil and Gas Co. v. Shipman*, 233 Ill. 9;
 (Ill.) *Poe v. Ulrey*, 233 Ill. 56;
 (Ill.) *Cortelyou v. Barnsdall*, 236 Ill. 138;
 (Ill.) *Bruner v. Hicks*, 230 Ill. 536.

For the purpose of more clearly placing before the court the construction given such contracts by the Supreme Court of the State of Illinois, the respondent will exhibit under the above proposition several of the so-called surrender clauses in similar contracts considered by that court.

The surrender clause in this case reads as follows:

"It is agreed, that the second party is to have the privilege of using sufficient water from said premises to run all machinery necessary for drilling and operating thereon, and at any time to remove all machinery and fixtures

placed on said premises; and, further, upon the payment of one dollar, at any time, by the party of the second part, heirs or assigns, shall have the right to surrender this lease for cancellation, after which all payments and liabilities thereafter to accrue under and by virtue of its terms shall cease and determine, and this lease shall become absolutely null and void."

The surrender clause in the contract construed in the case of *Ulrey v. Keith*, *supra*, reads as follows:

"It is agreed that upon the payment of one dollar, at any time, by the parties of the second part, their successors or assigns, to the parties of the first part, their successors or assigns, said parties of the second part, their successors or assigns, shall have the right to surrender this lease for cancellation, after which all payments and liabilities thereafter to accrue under and by virtue of its terms shall cease and determine and this lease become absolutely null and void."

The surrender clause in the contract construed in the case of *Watford Oil and Gas Company v. Shipman*, *supra*, reads as follows:

"It is expressly agreed that upon the payment of one dollar by the parties of the second part, their successors or assigns, to the party of the first part, their heirs or assigns, they shall have the right to surrender this lease for cancellation, after which all payments and liabilities thereafter to accrue under and by virtue of its terms shall cease and determine and this lease absolutely becomes null and void."

The forms of the actions and the relief sought and prayed for by the bills of complaint, and in the prayers thereof, in the cases of *Ulrey v. Keith* and *Watford Oil and Gas Company v. Shipman*, *supra*, are identical with the form of action and the relief sought and prayed for by the bill of complaint in this cause.

In the case of *Ulrey v. Keith, supra*, the court has declared the law to be as follows:

"The suit to enjoin the violation of a contract is governed by the same rules as a suit to enforce specific performance."

In the same opinion the court says:

"The most recent case in this court upon this subject is *Watford Oil and Gas Co. v. Shipman*, 233 Ill. 9, 84 N. E. 53. In that case Nancy E. Shipman, owner of the undivided one-tenth of certain real estate, executed an oil lease for the whole of the premises. The lease appears to have been in the same form as the one here involved and contained the same surrender clause. By successive assignments the leasehold passed to the Watford Oil and Gas Company. The bill averred that, while it was in full force and effect, Nancy E. Shipman and her co-tenants made a similar lease to another party, and were attempting to defeat and destroy the rights of the Watford Oil and Gas Company, and prayed an injunction and for a division and partition of the premises between Nancy E. Shipman and her co-tenants, and that the Watford Oil and Gas Company be decreed to have the right to go upon the portion of the premises set off to Nancy E. Shipman and develop the same for oil and gas. This court denied the relief prayed upon two grounds: First, that the lease gave the lessee no interest in the premises that entitled it to a partition; and, second, because of the surrender clause of the lease. Upon this subject the court said (page 13 of 233 Ill., page 54 of 84 N. E.): 'Aside from the imperfection in the title of appellant above pointed out, there is another reason why a court of equity will refuse appellant the relief sought. The lease in question contains the following clause: 'It is expressly agreed that upon the payment of one dollar by the parties of the second part, their successors or assigns, to the party of the first part, their heirs or assigns, they shall have the right to surrender this lease for cancellation, after which all payments and liabilities thereafter to accrue under and by virtue of its

terms shall cease and determine and this lease absolutely becomes null and void.' Under this clause appellant may surrender the lease for cancellation at any time, and thereby relieve itself from all future liability under it. The option of appellant to terminate the lease at any time upon payment of \$1 deprives appellant of the right to specific performance, directly or indirectly, until it has performed the contract or placed itself in such position that it may be compelled to perform the contract on its part. If the relief here sought should be granted, appellant, under the cancellation clause of the lease, may nullify the decree by exercising its option not to proceed further. A court of equity will not do a vain and useless thing by rendering a decree settling the rights of parties which one of them may set aside at his will.' Citing cases."

The case of *Ulrey v. Keith, supra*, is a very carefully written opinion, and is ~~right~~ ^{rich} with citations, and, from an examination of the same, can be found a complete list of all the authorities of the Supreme Court of Illinois on the subject.

The construction given by the Supreme Court of Illinois to such contracts as the one in question, established and settled the right of property of a valuable nature within the state, and, it would seem, should be followed by the Federal Courts, when property rights are involved with the State of Illinois.

THIRD.

The property right granted and conferred by contracts known as oil and gas leases, are the same in Indiana and Illinois.

(Ill.) *Watford Oil and Gas Co. v. Shipman*, 233 Ill. 9;

(Ill.) *Poe v. Ulrey*, 233 Ill. 56;

- (Ind.) *Gadbury v. Ohio, etc., Gas Co.*, 162 Ind. 9;
 (Ind.) *Kokomo Natural Gas and Oil Co. v. Matlock*,
 97 N. E. 787;
 (Ind.) *Heal v. The Niagara Oil Co.*, 150 Ind. 483.

RULE IN ILLINOIS.

In the case of *Watford Oil and Gas Co.*, *supra*, the court said:

"A lease of land to enter and prospect for oil or gas is a grant of a privilege to enter and prospect, but does not give a title to the oil or gas until such products are found. In the eye of the law oil and natural gas are treated as minerals, but they possess certain peculiar attributes not common to other minerals which have a fixed and permanent *situs*. Owing to their liability to escape, these minerals are not capable of distinct ownership in place. Oil and gas, while in the earth, unlike solid minerals, cannot be the subject of a distinct ownership from the soil. A grant to the oil and gas passes nothing which can be the subject of an ejectment or other real action. It is a grant, not of the oil that is in the ground but to such part thereof as the grantee may find. *Barringer & Adams on Mines and Mining*, pp. 30, 31; *Dark v. Johnston*, 55 Pa. 164, 93 Am. Dec. 732; *Shepherd v. McCalmot Oil Co.*, 38 Hun. (N. Y.) 37; *Wood County Petroleum Co. v. West Virginia Transportation Co.*, 28 W. Va. 210, 57 Am. Rep. 659; *Hall v. Vernon*, 47 W. Va. 297, 34 S. E. 764, 81 Am. St. Rep. 791. The right to go upon the land and occupy it for the purpose of prospecting it, if of unlimited duration, is a freehold interest (*Brunner v. Hicks*, 230 Ill. 536, 82 N. E. 888); but such interest, being vested for a specific purpose, becomes extinct when the purpose is accomplished, or the work is abandoned (1 Current Law 900)."

In the case of *Poe v. Ulrey, supra*, the court said:

"The freehold estate of homestead was involved in the circuit court under the pleadings, not because the lease of oil and gas was a conveyance of an interest in the homestead, but because the lease of the rights granted in the surface. Oil and gas are classed as minerals and that term is not confined to metallic substances, but, on account of the wandering and vagrant nature of oil and gas their liability to escape or to be withdrawn to other lands, they are not subject to absolute ownership. They belong to the owner of the land under which they are located so long as they remain there, but when they escape and go under other land the title of the former owner is lost. The grant of oil and gas is a grant of such oil and gas as the grantee may find, and he is not vested with any estate in the oil or gas until it is actually found. *Dill v. Frazee* (Ind. Sup.) 79 N. E. 971; *Ohio Oil Co. v. Indiana*, 177 U. S. 190, 20 Sup. Ct. 576, 44 L. Ed. 729."

It would seem that the rule in Illinois is quite clearly defined.

RULE IN INDIANA.

In the case of *Gadbury v. Ohio, etc., Gas Co. supra*, the court said:

"In grants of the character in question, the title is inchoate, and for the purpose of exploration only, until oil or gas is found in quantities warranting operation; and while the courts manifest a disposition to protect the grantee at this stage by treating his interest as no longer postponed to the happening of a condition precedent, yet it is thoroughly settled that he can not omit to develop the property and hold the grant for speculative purposes purely."

In the case of *Heal v. The Niagara Oil Company, supra*, the court said:

"Leases of the character of the present differ from the ordinary agricultural lease, in that the former may carry

a substantial and enduring interest in the freehold, while the latter vests but a transient and temporary interest, that of raising and removing crops. The former, however, in their primary effect, part with no immediate title or estate, and carry but right of exploration, any title or estate which may be contemplated remaining inchoate and of no effect until the oil or gas is found. *Venture Oil Co. v. Fretts*, 152 Pa. St. 451, 25 Atl. 732."

STATEMENT IN BRIEF OF PETITIONERS.

The petitioners make the following statement in their brief at pages 4 and 5 thereof:

"The Indiana cases, some of which are referred to in the Federal Oil Co., case, uniformly hold that a lease of the kind under discussion, does not constitute an encumbrance on or a conveyance or transfer of any interest in land, but gives merely a right of prospecting and exploring, and that the lessor parts with 'no immediate title or estate.' The most recent enunciation of this doctrine in Indiana will be found in *Kokomo Natural Gas and Oil Co. v. Matlock* (decided March 6, 1912), 97 N. E. Rep. 787; also reported in 39 L. R. A. (N. S.) 675."

It will be seen that the case of *Kokomo Natural Oil and Gas Co. v. Matlock*, *supra*, was an action at law on contract to collect a penalty or rental for a failure to drill wells, and the rules of law expressed in the opinion had reference to actions at law and not to suits in equity.

The respondent submits that it has been clearly shown that no distinction can be drawn between the decisions of the Supreme Courts of Indiana and Illinois as to the nature and extent of the property interests granted and conveyed by such contracts.

An exhaustive discussion by this court of the several

decisions of the Indiana Supreme Court on the question of the rights and property granted and conferred by such contracts as are now under consideration will be found in the case of *Ohio Oil Company v. Indiana*, 177 U. S. 190.

It will be found that the same rule governs in both states.

Again the respondent asserts that the case of *Federal Oil Company v. Western Oil Company*, 121 Fed. 674, contains a correct statement of the law as applied to the decisions of the Supreme Courts of both Indiana and Illinois and should be so considered in this case.

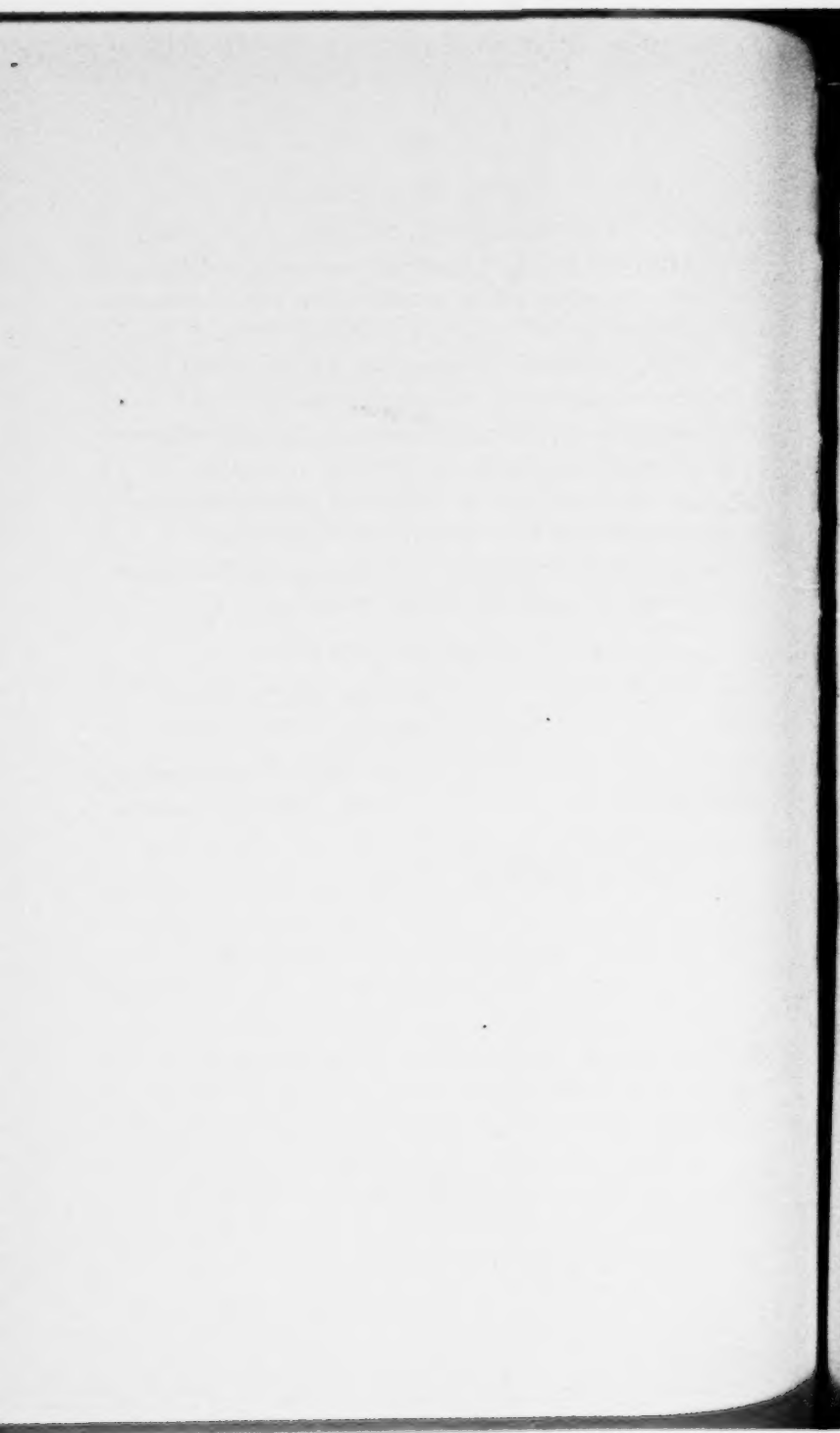
The respondent respectfully but most earnestly contends that the writ of certiorari should be denied.

Respectfully submitted,

ABRAM SIMMONS,
FRANK C. DAILEY,

*Attorneys for Respondent,
The Ohio Oil Company.*

ABRAM SIMMONS,
FRANK C. DAILEY,
Bluffton, Indiana.



Office Supreme Court, U. S.

FILED

JUN 8 1914

JAMES D. MAHER

CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. ~~410~~ 87

JOSEPH F. GUFFEY, A. S. GUFFEY, E. N. GILLESPIE,
AND ROBERT PITCAIRN, JR., CO-PARTNERS, TRADING
AS GUFFEY, GILLESPIE & PITCAIRN, PETITIONERS,

vs.

SUSANNAH SMITH, J. W. SOLLEY, C. F. JOHNSON,
WALTER HENNIG, AND THE OHIO OIL COM-
PANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Now come Susannah Smith, J. W. Solley, C. F. Johnson,
and The Ohio Oil Company, respondents in the above-en-
titled cause, and confessing error on the record consent that
the judgment of the Circuit Court of Appeals for the Seventh
Circuit in this case shall be reversed as to them, and that the
judgment of the circuit court, now the district court, for the
Eastern District of Illinois, as to the said Susannah Smith,
J. W. Solley, C. F. Johnson, and The Ohio Oil Company
shall be affirmed. As Walter Hennig, also a respondent in
this cause, refuses to confess error and consent to a reversal

of the judgment of the Court of Appeals for the Seventh Circuit, this case shall proceed as to him the same as if this judgment had not been entered. Three-fourths of all the costs now accrued in this case shall be paid by the respondents Susannah Smith, J. W. Solley, C. F. Johnson, and The Ohio Oil Company, and the remaining costs shall abide the further decision of this court.

JOSEPH W. BAILEY,
*Counsel for Petitioners and Acting
for the Respondents, Susannah
Smith, J. W. Solley, C. F. Johnson,
and The Ohio Oil Company,
for the Purpose of This Motion
Only in Accordance with an Authority
Conferred by an Instrument
Herewith Filed.*

12
Office Supreme Court, U. S.

FILED

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JAMES D. MAHER

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. ~~400~~. 86

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vs.

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WALTER HENNIG, AND THE OHIO OIL COM-
PANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Now come James A. Smith, J. W. Solley, C. F. Johnson, and The Ohio Oil Company, respondents in the above-entitled cause, and confessing error on the record consent that the judgment of the Circuit Court of Appeals for the Seventh Circuit in this case shall be reversed as to them, and that the judgment of the circuit court, now the district court, for the Eastern District of Illinois, as to the said James A. Smith, J. W. Solley, C. F. Johnson, and The Ohio Oil Company shall be affirmed. As Walter Hennig, also a respondent in

this cause, refuses to confess error and consent to a reversal of the judgment of the Court of Appeals for the Seventh Circuit, this case shall proceed as to him the same as if this judgment had not been entered. Three-fourths of all the costs now accrued in this case shall be paid by the respondents, James A. Smith, J. W. Solley, C. F. Johnson, and The Ohio Oil Company, and the remaining costs shall abide the further decision of this court.

JOSEPH W. BAILEY,

*Counsel for Petitioners and Acting
for the Respondents, James A.
Smith, J. W. Solley, C. F. Johnson,
and The Ohio Oil Company,
for the Purpose of This Motion
Only in Accordance with an Authority
Conferred by an Instrument
Herewith Filed.*

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JOSEPH F. GUFFEY, A. S. GUFFEY, E. N. GIL-
LESPIE and ROBERT PITCAIRN, JR., co-part-
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vs.

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SON, WALTER HENNIG, and THE OHIO OIL
COMPANY, a Corporation, Respondents,

and

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vs.

SUSANNAH SMITH, J. W. SOLLEY, C. F. JOHN-
SON, WALTER HENNIG, and THE OHIO OIL
COMPANY, a Corporation, Respondents.

No. 86.

No. 87.

BRIEF FOR PETITIONERS.

JOSEPH W. BAILEY,
ROBERT J. DODDS,
J. H. BEAL,

Attorneys for Petitioners.



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IN THE
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OCTOBER TERM, 1914.

JOSEPH F. GUFFEY, A. S. GUFFEY, E. N. GIL-
LESPIE and ROBERT PITCAIRN, JR., co-part-
ners trading as GUFFEY, GILLESPIE & PIT-
CAIRN, Petitioners,

vs.

JAMES A. SMITH, J. W. SOLLEY, C. F. JOHN-
SON, WALTER HENNIG, and THE OHIO OIL
COMPANY, a Corporation, Respondents,

and

JOSEPH F. GUFFEY, A. S. GUFFEY, E. N. GIL-
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COMPANY, a Corporation, Respondents.

No. 86.

No. 87.

**Writ of Certiorari to the United States
Circuit Court of Appeals for the
Seventh Circuit.**

Statement of the Case.

These cases are before the Court on Writs of *Certiorari* issued to the Circuit Court of Appeals for the Seventh Circuit.

On March 24, 1908, your petitioners filed in the Circuit Court of the United States for the Eastern District of Illinois, a bill in equity against Susannah Smith, J. W. Solley, C. F. Johnson, Walter Hennig, The Ohio Oil Company and others, setting forth, *inter alia*, that your petitioners were the owners of an oil and gas lease made by Susannah Smith to M. A. Walton on May 22, 1905, of a tract of land containing about ninety acres, situate in Crawford County, Illinois, which lease and the assignments thereof vesting title thereto in your petitioners had been duly recorded, the payments of rental thereon duly made, and the other covenants thereof kept by petitioners; that subsequently thereto, on or about August 31, 1906, the said Susannah Smith had made a *similar lease of the same tract of land* which, by assignment, became vested in the respondents, Solley, Johnson and Hennig, who had entered upon the said tract of land and were proceeding to operate for oil and gas. The bill prayed an injunction and an accounting.

On the same day the petitioners filed a like bill against James A. Smith, the two bills being identical save only in the description of the property covered by the lease.

After full hearing upon bills, answers and testimony, the Master recommended, and the Circuit Court entered, a decree in each case in favor of your petitioners, restraining the respondents, Solley, Johnson and Hennig, from interfering with your petitioners in entering upon said lands and operating the same for oil and gas purposes, and also for an accounting and restraining the Respondent Smith from aiding and assisting the other respondents in keeping petitioners out of possession.

From these decrees the respondents appealed to the United States Circuit Court of Appeals for the Seventh Circuit and that Court reversed the decree and directed that the bills be dismissed.

The decision of the Court of Appeals (as will be seen from the opinion, Record, p., 492) was based solely upon the ground that petitioners are not entitled to equitable relief because the leases held by them contain what is known as a "surrender clause," which is in the following words (Record, p. 351) :

"Upon the payment of One Dollar at any time by the part of the second part heirs, successors, or assigns, to party of the first part, heirs, successors or assigns, said part of the second part, heirs, or assigns shall have the right to surrender this lease for cancellation, after which all payments and rentals thereafter to accrue under and by virtue of its terms shall cease and determine, and this lease become absolutely null and void."

The Circuit Court of Appeals held that it was bound to deny petitioners equitable relief by the prior decision of that Court in the case of the *Federal Oil Company vs. Western Oil Company*, 121 Fed., 674.

The single question involved then is whether the presence of such a surrender clause in an oil and gas or other similar lease precludes the Court from granting equitable relief to and protecting the owner thereof in his property and rights thereunder.

Specifications of Error.

FIRST. The United States Circuit of Appeals for the Seventh Circuit erred in entering the following decree, which was entered October 1st, 1912, namely:

"This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Eastern District of Illinois, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered, adjudged and decreed by this Court that the decree of the said Circuit Court in this cause be, and the same is hereby reversed with costs; and this cause be, and the same is hereby remanded to the District Court of the United States for the Eastern District of Illinois with direction to dismiss the bill of complaint for want of equity."

SECOND. The United States Circuit Court of Appeals for the Seventh Circuit erred in not entering a decree affirming the decree of the Circuit Court of the United States for the Eastern District of Illinois.

Argument.

Point I.

The respondents admit that the petitioners have the prior legal right, and the only defense made is that a court of equity will deny petitioners any remedy because of the surrender clause contained in their leases.

(1) Petitioners' leases are in the usual form of oil and gas leases, and were duly executed and delivered on May 22, 1905; on November 13, 1905, they were assigned to Prosser, and on December 26, 1905, by him assigned to Gillespie, one of the petitioners; and the leases and these assignments, all properly acknowledged, were duly recorded on June 15, 1906.

(2) The respondents claim under a lease made by our lessors to Allison, dated August 9, 1906, but acknowledged and delivered August 31, 1906, assigned to Willet September 1, 1906; the assignment and lease recorded January 28, 1907, and the assignment to the respondents, Solley, Johnson and Hennig, made on March 25, 1907, and recorded April 1, 1907.

Priority, therefore, rests clearly with the petitioners.

Willoughby vs. Lawrence, 116 Ill., 11.

(3) The petitioners' leases, notwithstanding the presence of the so-called surrender clause, are valid and binding leases (*Poe vs. Ulrey*, 233 Ill., 56) and they vest in the petitioners a *freehold* estate (*People vs. Bell*, 237 Ill., 332).

(4) The petitioners have not been in default in the performance of any of the covenants of their leases. The Master in his seventh finding of fact (Record, p. 352) says:

"The Master further finds that the complainants have been at all times financially responsible and able to perform the covenants of their lease; that they have not drilled a well on said premises, but that they have paid all the rentals required by the terms of said lease to be paid, at the rate of twenty-five cents per acre, and deposited the same in the bank designated in the lease to receive the same, for the owner of the land."

The petitioners fully observed the covenants contained in the leases, and no extrinsic facts were shown raising any implied covenant or any further obligation upon the part of the petitioners. When the leases were taken, these properties were in "wild-cat" (*i. e.*, unexplored) territory—the nearest operation being fifteen miles away, and at the time the respondents entered and drilled, there were no operations on adjoining properties which threatened to drain the oil from these properties.

The defense as stated by the opinion of the Circuit Court of Appeals (Record, p. 492) is:

"The question presented in these cases is whether or not lessees under such oil and gas leases as those under which appellees (complainants in the Circuit Court) claim, will be given the aid of a court of equity, for the protection and enforcement of the rights thereby conferred upon them to enter the property and to prospect for oil and gas, as against their lessors and the latter's grantees under subsequent leases taken with notice of the prior leases, who have entered upon the premises, dug wells and are barring out the first lessees."

It should be noted here that the respondents, in making this defense, set up a claim under leases containing a similar surrender clause. (Record, p. 9.)

Point II.

A surrender clause such as contained in the petitioners' leases is a fair, proper and usual provision in contracts of this character.

This so-called surrender clause is the usual one to be found in substantially all oil and gas leases, and is a fair and equitable provision, as found by the Master (Record, p. 352).

In the Record (pages 218-248) will be found the testimony of a number of men of long experience in the oil and gas business, and whose experience covers practically all of the principal oil fields in the United States. Their testimony shows, and the fact is, that

the practice of paying a rental, usually per acre, for delay in drilling wells, prevails universally in the oil and gas business and has for many years. It is estimated that the rentals paid in West Virginia alone exceed a million and a half to two million dollars a year (Record, p. 219). The business is of such a hazardous character that the early developer of any field must, in view of the expense involved, be assured of a considerable block of leases, and in view of the rental payments, in case the territory is proven unprofitable, he must have some means of relieving himself from continuing to pay rentals. It is the object of the surrender clause to accomplish this fair result.

Companies engaged in supplying gas, and in the oil business, necessarily require some assurance as to their future supply, and for this reason it is necessary to lease lands considerably in advance of actual operation. *It is impracticable to drill all the property which may be held under lease as soon as it is leased, and no good result would follow such a course. On the contrary, the result would be a tremendous overproduction of oil and gas, and, especially in the case of gas, a tremendous loss.*

In view of these conditions, it is impracticable to carry on the oil and gas business without such protection as is afforded by the surrender clause; and the evidence shows that it is a fair provision, benefits the land owner in that it gives him an income while his property is being held pending development, and at the same time protects the operator in case the property should prove valueless for oil or gas purposes.

As evidencing that a surrender clause is not an inequitable provision in an oil and gas lease, all leases made by the Interior Department for the leasing of Indian lands for oil and gas purposes contain a surrender clause.

No form of oil and gas lease containing an unconditional covenant to drill a well has ever been in general use. In Pennsylvania, the oldest oil and gas state, the first lease used contained a covenant to complete a well or commence operations by a certain time, or thereafter to pay rental. It was not long before the operator learned that however bad prospects became, still he could not surrender the lease or abandon the premises so as to escape the payment of rental, without the consent of his lessor. To escape this hardship, this clause was inserted in the lease:

"A failure by lessee to perform any of his covenants shall work an absolute forfeiture and the lease shall thereupon become null and void."

But the courts held this clause of forfeiture to be exclusively for the benefit of the lessor and unless he elected to forfeit the lease, the rental continued to accrue, and that this provision merely gave the lessor an additional remedy: *Wells vs. Mfg. Co.*, 130 Pa., 222, and *Cochran vs. Pew*, 159 Pa., 184.

The next form of lease to come into general use contained no covenant either to drill or pay rental. This provision, or its equivalent, was inserted instead:

"Provided, however, that this lease shall become null and void and all rights thereunder cease

and determine unless a well be completed within
..... or lessee pay..... per acre per
year in advance until a well is completed.”

The courts, without exception, held that the lessee under such a clause was not bound to pay any rental at all. The leading case in Pennsylvania, and elsewhere, is *Glasgow vs. Chartiers Oil Co.*, 152 Pa., 48 (1892). This case has been followed by the courts of last resort in the other oil and gas states where the question has arisen. In West Virginia, in *Snodgrass vs. South Penn Oil Co.*, 47 W. Va., 509; 35 S. E., 80 (1900), the court said the lease—

“did not bind the lessee to pay any rent for the land or for delay in commencing to operate for oil and gas, and, in the absence of some such clause binding the lessee to pay such rent for delay, an action of assumpsit could not be maintained on the lease for failing to pay the rent due for such delay.”

Leases in this form, if not supported by a present consideration, either recited or paid at the time of execution and delivery, since they contain no covenant to either drill or pay rental, were, of course, held to be without consideration and *nudum pactum*: *Steelsmith vs. Gartlan*, 45 W. Va., 27; 44 L. R. A., 107. A more recent case is *Cortelyou vs. Barnsdall*, 236 Ill., 138 (1908). Also, even in leases of this character, which were supported by a present consideration, some of the courts inclined to confine the efficacy of the consideration paid to a support of the lease during the term in which a well was to be completed, thereby leaving no consideration moving to and no obligation upon the lessor to thereafter accept the rental when tendered. The temptation to so construe this form of lease was even greater when it

had been given for no definite term. So, in *Federal Oil Co. vs. Western Oil Co.*, 121 Fed., 674, the lease was for no definite term and the court held it to be a continuing optional agreement, without limitation in time, and, for this reason, unenforceable. But other courts took a different view and held the lessee bound for a reasonable time to accept the rental, if tendered. *Erie-Crawford Oil Co. vs. Meeks*, 81 N. E., 518; *Venedocia Oil & Gas Co. vs. Robinson*, 73 N. E., 222 (Ohio, 1905).

However, aside from doubt as to the legal sufficiency of this form of lease, it has met, and deservedly, with no favors from the courts. In the first place, its form is such as to be invariably misunderstood by the ordinary layman and, from his point of view, is "deceptive." Secondly, this form of lease is otherwise very unsatisfactory in that its determination under the forfeiture clause depends upon the acts of the parties, the payment or tender of rental when due, and its acceptance or refusal, matters *in pais*, and often impossible or most difficult of proof.

Then comes the form of lease which the testimony shows has promoted good feeling between the land owners and operators and is now in general use—the form of lease *under which both Solley, Johnson and Hennig, and the appellees now claim.*

A lease given for a present consideration, usually one dollar, to continue in force for a definite term (in these cases) of five years, and as long thereafter as oil or gas should be produced, containing, as the earlier forms of leases had done, an express covenant to drill, or pay rental, for delay, in advance, and giving the lessee the right at any time to pay one dollar and surrender

the lease for cancellation, after which all payments and liabilities should cease and determine and the lease become null and void. (Record, pages 60 to 67, 197 to 203.)

Observe that a surrender can only be accomplished by the payment *in fact* of the one dollar and by a surrender *in fact* of the lease, and that its effect is to cut short the term of the lease, and in no way to affect accrued payments or matured obligations. The delay rental continues to accrue down to the very moment of surrender, and when a surrender is made the landowner must receive a written instrument which he can record, showing that the determination of the lease.

The fact that respondents' leases contained a surrender clause is further confirmation that the provision is usual and fair.

Point III.

The provision giving petitioners the right for a valuable consideration to surrender the leases does not bar the petitioners from relief in a court of equity.

The question involved in these cases is one of nation-wide importance. It affects not only the leases of private persons, but the same surrender provision is contained in the oil leases issued by the Interior Department when leasing Indian lands for oil and gas purposes. Confusion and uncertainty, and conflict of decisions, envelope the question to an unusual degree. The enforceability, not to say validity, of very many thousands of iron, coal, gas, and oil leases hang in the

balance. All of that class of leases have, for many years, contained the provision which the Circuit Court of Appeals of the Seventh Circuit has in this case held fatal to their enforcement by injunction.

As indicating the importance to the oil industry alone of the question here involved, the recent census of the United States shows that of 14,072,064 acres of oil producing lands 13,385,796 acres are held under lease, only 686,268 acres being owned in fee.

The opinion of the Circuit Court of Appeals was rendered by Judge Mack, and concurred in by Circuit Judge Kohlsaat and District Judge Sanborn. The opinion on its face, we think, indicates clearly that the court did not, to quote from its language, consider itself "free to consider the question on its merits." If, in the interpretation of an opinion, counsel may be permitted to read between the lines, we would be tempted to say that the Circuit Court of Appeals would have arrived at a different conclusion had it not felt itself "concluded by the decision of this" (that) "court in *Federal Oil Co. vs. Western Oil Co.*, 121 Fed., 674."

Further on in this discussion, we refer to the Federal Oil Company case, and we think successfully distinguish it from the one at bar. But two judges (Jenkins and Grosseup) sat in the Federal Oil Co. case. Not only can that decision be differentiated from the one at bar, but the Federal Oil Co. case involved an Indiana lease, and followed, as a rule of property, the decisions of that state, which hold that "the legal effect of the instrument here in question "(oil and gas lease) "is therefore the grant of a mere use, for the purpose of

prospecting. The title is inchoate, and for the purposes of exploration only, until the oil or gas is found; if not found, *no estate vests in the lessee,*" etc.

The Indiana cases, some of which are referred to in the Federal Oil Co. case, uniformly hold that a lease of the kind under discussion, does not constitute an encumbrance on or a conveyance or transfer of any interest in land, but gives merely a right of prospecting and exploring, and that the lessor parts with "no immediate title or estate." The most recent enunciation of this doctrine in Indiana will be found in *Kokomo Natural Gas & Oil Co. vs. Matlock* (decided March 6, 1912), 97 N. E. Rep., 787; also reported in 39 L. R. A. (N. S.), 675.

In Illinois such a lease transfers a freehold interest in the premises, and, in order to be valid, must "contain a release or waiver of the homestead rights," etc. (*Bruner vs. Hicks*, 230 Ill., 536; *Poe vs. Ulrey*, 233 Ill., 56, 62; *Gillespie vs. Fulton Oil & Gas Co.*, 236 Ill., 188, 201; *People vs. Bell*, 237 Ill., 332).

The Circuit Court of Appeals in the present case, therefore, in relying upon the Federal Oil Co. case, was following one which arose in a state where a different rule of property applies from that which prevails in Illinois.

But in the present case, the Circuit Court of Appeals also held (and properly) that it was not bound by the decisions of the Supreme Court of Illinois on the question of whether an equitable remedy would or would not be applied.

The rule is, of course, well established that Federal Courts, in the exercise of their jurisdiction in equity, and in determining questions which depend upon the general principles of equity jurisprudence, are not bound to follow the decisions of the courts of the state wherein they sit or where the controversy arose. (*Russell vs. Southard*, 12 How., 139; *Kuhn vs. Fairmount Coal Co.*, 215 U. S., 349; *Black's Law of Judicial Precedents*; or the *Science of Case Law* (1912), Sec. 198, pp. 655-656).

When the court in the Federal Oil Co. case said (p. 677) that "Equity will not specifically enforce a contract against one party, when it cannot be specifically enforced against the other," it referred to *Marble Co. vs. Ripley*, 10 Wall., 339, 359.

Professor Ames, in his article on "*Mutuality in Specific Performance*," in Vol. 3, No. 1 (Jan., 1903), of the *Columbia Law Review* (pp. 1 to 12), speaks of the ruling on this point in *Marble Co. vs. Ripley* (at page 11) as having been merely "*dicta*," and, as showing that the rule in this court is not that sometimes attributed to *Marble Co. vs. Ripley*, refers to *Franklin Telegraph Co. vs. Harrison*, 145 U. S., 459.

So also Mr. Pomeroy, the author of the article on *Specific Performance*, in Vol. 36 of *Cyc.*, beginning at page 528, in referring to *Marble Co. vs. Ripley*, says:

"The rule (here under discussion) originated in some remarks in the course of the opinion in *Rutland Marble Co. vs. Ripley*, 10 Wall., 339, in which case, however, there were several other defenses of undoubted validity."

and then the author compares *Rutland Marble Co. vs. Ripley* with *Franklin Telegraph Co. vs. Harrison*, 145 U. S., 459, "which seems on its facts to be inconsistent with the rule."

The same author (Professor Pomeroy) in speaking of contracts terminable by plaintiff at any time, says (at page 631) :

"A rule unknown to English equity has in late years obtained a foot-hold in several jurisdictions, that a continuing contract will not be enforced specifically if it is one which, by its terms plaintiff is permitted to terminate at will. A reason for the rule is supposed to be found in the well established doctrine that a contract terminable at will by *defendant*" (italics are our own) "will not be the subject of a decree, since it is to be presumed that the decree will at once be nullified by defendant."

In commenting upon that doctrine, in an interesting note, the same author says (p. 632) :

"The rule originated in some remarks in the course of the opinion in *Rutland Marble Co. vs. Ripley*, 10 Wall., 339, in which case, however, there were several other defenses of undoubted validity. In *Rusk vs. Conrad*, 47 Mich., 449, it was the ground of the decision; a natural decision, since the court had recently refused specific performance of an ordinary option. Later cases, relying on these, seem to accept the rule as well established by unquestionable authority. None of the opinions give evidence of having weighed the very serious objections to the policy of the rule. There is no real analogy between the position of a defendant

resisting specific performance, who may at will nullify a decree, and that of a plaintiff who has given the most practical possible demonstration of his desire to carry out the contract by engaging in a law-suit for the purpose. To call the decree in the latter case 'an idle formality' (*Federal Oil Co. vs. Western Oil Co.*, 112 Fed., 373; affirmed in 121 Fed., 674), is to outrage common sense. To decline relief in these cases, on a ground so technical is to outlaw a large species of most important contracts in which it is necessary for one party's protection that the duration of the contract should be more or less indefinite. *Rusk vs. Conrad*, *supra*, for instance, dealt such a blow to the development of the mineral resources of Michigan, that it was quickly overruled by statute. * * * Several of the cases cited, where plaintiff, in reliance on the contract, had incurred large expenditures, can only be described as flagrant miscarriages of justice. See *Fowler Utilities Co. vs. Gray*, 168 Ind., 1, ignoring the previous decision of the same court in *St. Joseph Hydraulic Co. vs. Globe Tissue-Paper Co.*, 156 Ind., 655."

A recent illustration of the rule which fits in with the development of the doctrine, and the logic of the law, is *Jones vs. Earl of Tankerville*, Law Reports, Chancery Division, 1909, Vol. 2, p. 440. There plaintiffs entered into a contract with the defendant for the purchase of certain timber growing on the defendant's property. The plaintiffs began cutting and removing timber, and the defendant thereafter repudiated his contract, and forcibly ousted the plaintiffs. Plaintiffs thereupon asked for an injunction, to restrain the defendant from preventing plaintiffs from cutting the

timber. It was contended that because the defendant could not have compelled the plaintiffs to cut the timber, but would have had merely his remedy at law for damages, therefore the plaintiff could not, by injunction, prevent the defendant from interfering with the plaintiffs in the cutting of the timber. It was argued that "in contracts of this sort, there is a want of mutuality, which precludes the remedy by way of specific performance." The court replied:

"* * * A court of equity, in granting an injunction, would only be restraining the violation of a legal right. An injunction restraining the revocation of the license" (to enter and cut timber) "when it is revocable at law, may, in a sense, be called relief by way of specific performance; but it is not specific performance in the sense of compelling the vendor to do anything. It merely prevents him from breaking his contract. * * *"

The doctrine that a contract, to be enforced by injunction, must be one that can be mutually specifically enforced, is a fallacious statement of the rule, and is at variance with an accurate understanding of fundamental principles and of the doctrine and its development. It is a misapprehension of the law to say that a contract can not be enforced by injunction at the suit of the plaintiff because the other party, if plaintiff, could not obtain such a remedy. The law does not require that there shall be mutuality of the same remedy, but merely that there shall be mutuality of obligations, and that the contract shall be enforceable at the suit of both parties thereto—not that the remedy of each party shall be the same.

The doctrine is juridically analyzed, and the true rule announced, in Professor Ames' article, in 3 Columbia Law Review, p. 1.

Professor Langdell, in speaking of this much misunderstood rule, said, in 1 Harvard Law Review, at p. 104:

"The rule as to mutuality of remedy is obscure in principle and in extent, artificial, and difficult to understand and to remember."

The true rule is stated thus, in *Northern Central Ry. Co. vs. Walworth*, 193 Pa. St., 207:

"The principle that contracts must be mutual—must bind both parties or neither—does not mean that in every case each party must have the same remedy for a breach by the other, but that the contract is enforceable on both sides in some manner; not necessarily enforceable on both sides by specific performance."

Like doctrine was laid down in the later Pennsylvania case of *Philadelphia Ball Club vs. Lajoie*, 202 Pa. St., 210; in that case the plaintiff had the option to terminate the contract. The court said:

"If the doctrine laid down in *Rusk vs. Conrad*, 47 Mich., 449" (subsequently changed by statute—see *Grummett vs. Gingrass*, 77 Mich., 369), "quoted in the opinion, is to prevail, it would seem that the power of the plaintiff to terminate the contract upon short notice, destroys the mutuality of the remedy; but we are not satisfied with the reasoning

intended to support that conclusion. We can not agree that mutuality of remedy requires that each party should have precisely the same remedy, either in form, effect, or extent."

In *Eckstein vs. Downing*, 64 N. H., 248, the court quotes from *Pomeroy on Specific Performance*, Sec. 159, Note 1, thus:

"Indeed, the rule, so far as it relates to the mutuality of the remedy alone, is evidently based upon no principles of abstract right and justice, but, at most, upon notions of expediency."

Then the court adds:

"A technical rule is, or should be, subject to the general inquiry whether a party requires other and better relief than a suit at law can give."

And at page 260:

"The mutuality required is that which is necessary for creating a contract enforceable on both sides in some manner (citing authority) but not necessarily enforceable on both sides by specific performance."

In *Montgomery Light & Power Co. vs. Montgomery Traction Co.* (decided October 16, 1911), 191 Fed., 657, there was a contract on the part of a street railroad company to take all of the electrical power required in its business, for a term of years, from an electric power company. The contract gave the street railroad company the right, under certain circumstances, at its elec-

tion, to terminate the contract. The court (Jones, District Judge), in a long review of the authorities, approvingly cites the language above quoted from *Northern Central R. R. Co. vs. Walworth*, 193 Pa., 207, and adds:

“Though clearly lack of mutuality may exist in the terms of the agreement, inasmuch as some of the terms are unenforceable in equity, yet the final test shows that the remedy of a conditional decree does not leave the defendant to a legal remedy, as plaintiff must give performance as long as he receives it. * * * The doctrine thus laid down has received the approval of the Supreme Court in three late cases, specifically enforcing contracts similar in character to that involved here.” (Citing *Franklin Telegraph Co. vs. Harrison*, 145 U. S., 459; *Joy vs. St. Louis Ry. Co.*, 138 U. S., 1; *Union Pacific R. R. vs. Chicago Ry. Co.*, 163 U. S., 564, 601.)

DECISIONS IN THE STATE COURTS.

In *Pyle vs. Henderson*, 65 W. Va., 39, the Supreme Court held that the presence of a surrender clause in a lease did not bar a right to equitable relief. In that case the bill was filed by the second lessee against the first lessee. The first lessee, whose lease contained a surrender clause, had failed to drill a well or pay rental within the period provided. The Court, however, found that his default in paying the rental was excusable, held that the lessor had no right to make the second lease, dismissed the second lessee's bill filed to have

the first lease declared a cloud upon the title, and upon the defendant's cross-bill granted an injunction against the second lessee and compelled him to account for the oil taken from the land.

In *Busch-Everett Co. vs. Vivian Oil Co.* (128 La., 886), decided by the Supreme Court of Louisiana, the defendant had obtained from a former owner an oil and gas lease containing a provision that if a well were not completed within three months the grant was to become null and void but that the lessee might prevent such forfeiture by paying from month to month a certain sum until a well was completed; with a further provision reserving to the lessee the right to put an end to the contract by paying one dollar. No well having been completed, the vendee of the land refused to receive the monthly rental when tendered. The Court held that the provisions we have referred to did not render the contract lacking in mutuality and that the lessee was entitled to be protected in its property rights.

In *Central Ohio Natural Gas & Fuel Company vs. Eckert*, 70 Ohio State, 127, the lease provided that the second party should drill a well within six months or thereafter pay lessor \$160 annually "until said well is drilled or the property hereby granted is reconveyed to the first party." No well was drilled but the rental was paid for several years when the lessor refused to accept further rentals and made a second lease for the property. The lessor and the second lessee then filed a bill against the first lessee for an injunction and decree quieting plaintiffs' title, and the Court below entered a decree in their favor. This was reversed by the Supreme Court, and the case remanded for further proceedings.

In Illinois, however, the situation is somewhat peculiar. In *Poe vs. Ulrey*, 233 Ill., 56, a bill was filed by the lessor to have the lease declared void because of the presence of the surrender clause. This relief the Court refused, holding that the presence of this clause did not render the lease invalid or create a tenancy at will, terminable at the option of either party. But in *Ulrey vs. Keith*, 237 Ill., 284, on a bill filed by the lessee against the lessor to restrain the lessor from interfering with the lessee in operating for oil and gas under a similar lease, the Court refused the relief upon the ground of the presence of the surrender clause, holding that the granting of such a remedy was governed by the same rules as a bill for specific performance, and holding that the presence of the surrender clause destroyed the mutuality required for a decree of specific performance.

This decision has been very strongly criticized by Professor Henry Schofield in 3 Illinois Law Review, 43, 601, 608, and is there shown to be at variance with the reason and history of the law and with the weight of authority.

Before the Master it was contended that because of this surrender clause and the decision of the Supreme Court of Illinois in *Ulrey vs. Keith*, 237 Ill., 284, no relief could be granted to Appellees. The disastrous results of such a doctrine to those engaged in the oil and gas business are thus expressed by the Master (Record, p. 358) :

"If such were the law, no oil or gas company developing lands under a lease containing a surrender clause would be secure for a moment, as an-

other oil company, under a similar lease, could, with the connivance of the owner of the land, dispossess the first operator by force, and the later would be deprived of any remedy whatever in the courts. Such a state of affairs, instead of producing any relief, would be a source of disorder and contention, and in many instances, doubtless the cause of armed conflict."

The Master refused to adopt the appellant's theory upon two grounds which are very clearly set out in his report:

(1) That the rule laid down in *Ulrey vs. Keith*, which was a contest between lessor and lessee, did not apply where the real parties to the contest were, as in the present case, two rival lessees, and the injunctive relief sought as against the lessor was simply to restrain him from aiding and assisting the rival lessee in interfering with the rights of the earlier lessee.

(2) That if *Ulrey vs. Keith* intended to decide that such relief could not be had, in such a case, it was not binding upon the Federal Court, and that under the Federal rule the Appellees were entitled to equitable relief.

On the first point he said, referring to *Ulrey vs. Keith*:

"That this rule would be followed between two rival lessees or assignees of such lessees, each claiming under a separate lease containing the same vice or infirmity, to the Master seems exceedingly

doubtful. There is no contract relation between the rival lessees. So far as either of them is concerned, the prior lease has the better title. There is no relation between them, whereby the question of specifically performing anything could possibly exist. Between them, it is simply a question of which one, as against the right of the other, is a trespasser. There is no contract relation between them that a court could say is so lacking in mutuality as to bar a bill for specific performance, and unless this element exists, it does not appear on what grounds relief should be denied."

The Supreme Court of Oklahoma, in *Kolochny vs. Galbraith*, 26 Oklahoma, 772, has adopted the doctrine of the Illinois courts.

THE CASES IN THE FEDERAL COURTS.

Putting aside for the moment the decision of the Circuit Court of Appeals in the present case and the decision in the *Federal Oil Case*, the question of the enforcement of such leases has been several times before the Federal courts.

In *Allegheny Oil Company vs. Snyder*, 106 Federal, 764, the Circuit Court of the United States for the Southern District of Ohio, granted an injunction at the suit of the first lessee, who had never entered, as against the second lessee, who had entered and drilled, and on appeal this was affirmed by the Circuit Court of Appeals in an opinion by Mr. Justice Day (then Circuit Judge). The report shows that this lease contained the usual surrender clause, but no question seems to have been raised in the case that this barred the Court from granting the relief which it did give in that case.

Again, in *Logan Natural Gas Company vs. Great Southern Company*, 126 Federal, 623, in the Sixth Circuit, the bill was filed by a lessee who had never entered against a lessee who had entered and drilled. While the report does not show it, the record in the Court below discloses the fact, that these leases contained the usual surrender clause. In this case the injunction was granted.

Mr. Justice Lurton (then Circuit Judge) sat in the Circuit Court of Appeals on the hearing of both the foregoing cases.

Mr. Justice Van Devanter considered the effect of a surrender clause in *Brewster vs. Lanyon Zinc Company*, 140 Federal, 801, while sitting as Circuit Judge in the Circuit Court of Appeals for the Eighth Circuit. That was a bill in equity to establish as a matter of record the forfeiture of an oil and gas lease. One of the grounds upon which this was sought was the presence of a provision authorizing the lessee at any time to remove his property and reconvey the premises granted, whereupon the lease should be null and void. It was claimed that this provision rendered the lease wanting in mutuality, and of this contention Mr. Justice Van Devanter, in delivering the opinion of the Court, said:

"The option reserved to the lessee was not designed to convert the estate, as otherwise defined, into a mere tenancy at will, or to make it determinable at any time at the option of the lessor. The lease expresses the intention of the parties, and no rule of law forbidding, that intention is controlling. The consideration of \$1, the receipt of which was acknowledged, although small, was yet sufficient

to make the lease effective and to support every stipulation in it favorable to the lessee, including the option to surrender it at any time. *Brown vs. Fowler*, 65 Ohio St., 507, 525, 63 N. E., 76; *Gas Co. vs. Eckert*, 70 Ohio St., 127, 135, 71 N. E., 281; *Davis vs. Wells*, 104 U. S., 159, 168, 26 L. Ed., 686; *Allegheny Oil Co. vs. Snyder*, 45 C. C. A., 604, 608, 106 Fed., 764, 767. *Resting, therefore, upon an executed and valuable consideration, the lease was not wanting in mutuality merely because it reserved to one party an option which it withheld from the other. Brown vs. Fowler and Gas Co. vs. Eckert, supra*, 9 Cyc., 334."

Coming now to the *Federal Oil Company case*, we respectfully submit that the Court below was in error in holding that it was concluded by that decision from considering the present case on its merits.

In the *Federal Oil Company case*, 121 Fed., 674, the lease contained this provision:

"In case no well is commenced within one day from this date, then this grant shall become null and void *unless* second party shall thereafter pay at the rate of eight and seventy-five hundredths dollars (\$8.75) for each month such commencement is delayed in advance. * * * Second well shall be completed *ninety days* after first well and a well each ninety days thereafter until *seven* wells are in, then rental to cease.

The second party * * * may cancel and annul this contract *or any part thereof* at any time."

The lessee having failed for nine months to drill *any* wells, the lessor refused to receive any further rentals and made a second lease, whereupon the first lessee filed a bill for an injunction. The Court below sustained a demurrer and this was affirmed by the Circuit Court of Appeals in an opinion by Circuit Judge Jenkins; and the ground upon which the decision is rested can best be shown by the following language from his opinion:

“With respect to the agreement in question, there are two considerations which go far to impeach its fairness:

First, its want of mutuality. No obligation is assumed by the appellant to do anything—*either to drill or to pay*. It is in fact a mere option. It is undoubtedly true, as urged by the appellant, with respect to enterprises of this character, that a company proposing to obtain natural gas or oil in large quantities for sale or manufacturing purposes finds it desirable to acquire exclusive right to search for the fugitive mineral in a large area or areas; and, though it be not necessary for the proper development of the particular area to drill a well upon the land of all the several proprietors within the district, it is desirable and profitable to have no competing wells on the territory near to wells deemed sufficient for the development of the territory. *That, however, was not the purpose of this contract.* It contemplated *immediate* exploration upon the particular land. There was here an entire want of mutuality—an utter absence of *obligation* on the part of the appellant.” * * *

"Secondly, *this agreement, upon its face, is without limit of time. There is no period of time within which the end sought to be accomplished must be commenced or the contract should cease. It is terminable at the will of appellant.*"

In contrast with this, in the case at bar we have a lease (1) based upon a valuable consideration, (2) for a fixed term of five years, and longer if oil or gas be found within five years; (3) an express covenant to pay rental, upon which an action at law could be maintained; (4) a right in the lessee upon payment of one dollar to surrender the lease and relieve himself from thereafter paying rentals, and (5) the terms of the lease fair and equitable in all its provisions as found by the Master and the Court below.

The Court will observe then in the *Federal Oil case* (1) there was no *covenant* to pay rental—the provision being only that the lease should become null and void *unless* payment was made. (2) No definite term. If rentals were paid operations could be deferred forever. (3) The Court held that the parties *contemplated immediate* operations; but there was no express covenant to drill a well at any time.

In case no well was commenced within one day, then the lease was to become null and void *unless* the lessee paid \$8.75 per month. Then there was a provision that the second well should be completed within ninety days after the first well, and a well each ninety days thereafter until seven wells were completed. But, as pointed out by Judge Baker in the Court below (112 Federal, at page 376), the lessor was without remedy

because he could not compel the drilling of the first well. And taking all the provisions of the lease and the conduct under it, Judge Jenkins said of it:

“Certainly the contract is most *unfair* and it would be *unconscionable* for a court of equity to place the appellant (the lessee) in a position to forever deprive the owner of the soil of the right to use his land or to drill for such treasures as the earth may contain.”

The Court below disregarded all of these differences excepting two, namely: (1) the fixed term in our leases of five years and (2) the express covenant to pay rental for delay.

As to the five year term: The Court below held this did not differ essentially from the indefinite term in the Federal Oil lease because the indefinite term did not render that lease void but only substituted a reasonable time instead of a fixed period for explorations. This, we submit, overlooked the fact that when the lease fixed five years, the parties had agreed upon what should be the period allowed for explorations, and this they did upon a consideration agreed upon between them. The difference, then, is this:

Where no period is fixed and the delay in beginning operations is unreasonable—as the Court held it was in the Federal case—the lessee may forfeit the lease and release to other parties; but where the lease fixes a term, no such right exists because the lessee has paid for the right to the whole of the specified period.

As to the covenant to pay rental: The Court below admits that our lease contains an express covenant to pay rental; but it says that under the surrender clause the lessee may at any time surrender and thereby destroy this covenant; and then the Court says that while in order to do this, the lessee must pay one dollar and make an actual surrender, still this is only a nominal obligation which will not induce a court of equity to act. The result, therefore, is that the Court below first uses the surrender clause to destroy our express covenant to pay rental, and then it makes the fact of the right to surrender upon payment of what it calls a nominal obligation, destroy our right to an equitable remedy. From this it would appear as though perhaps the Court in the last analysis, had refused us relief because of a lack of a substantial consideration. But that this was not what the Court had in mind is clear from the second paragraph of the opinion where it says that the exact question has been decided by the Supreme Court of Illinois in *Ulrey vs. Keith*, 237 Ill., 284, and turning to that case we find that no question of consideration was involved, the decision being put expressly upon the ground of a lack of mutuality which the Court considered requisite for a decree of specific performance because the lease contained a surrender clause.

There is, we submit, some confusion of thought in the reasoning of the court below. The petitioners' lease was made for a valuable consideration, and, as said by Mr. Justice Van Devanter in the *Brewster* case (140 Fed., at p. 807) :

"although small, was yet sufficient to make the lease effective and to support every stipulation in

it favorable to the lessee including the option to surrender."

Here the lease has provided what shall be the result of failure to drill within nine months, namely, the lessee must, and he covenants to, pay a fixed rental. The surrender clause is independent of this covenant to pay rental, and if the lessee desires to avail himself of it, he must pay one dollar and make an actual surrender; but when made, such surrender terminates the covenant only as to future rentals. It is not the consideration upon which the lessee might terminate the lease which is important in determining whether equity will grant relief; but the consideration pertaining to the entire contract. That consideration was one dollar, the covenants contained in the lease, the payment of rental at the rate of 25 cents per acre per annum, payable quarterly in advance, which payments the Master has found were in fact made, and if the lease is to be surrendered, one dollar must be paid and an actual surrender made; and this would include the execution and delivery of a re-conveyance, or other proper written instrument evidencing such surrender, duly acknowledged so that it might be recorded.

Even if the petitioners had been seeking in equity to enforce the rights given them by the surrender clause, the Court would have looked not alone at the separate consideration provided for by that particular covenant, but at all of the provisions of the contract, and so regarding it, certainly would have held the consideration substantial.

So that (1) the surrender clause cannot properly be said to be based upon a merely "nominal obligation," and (2) the fact of the right to surrender did not destroy the express covenant to pay rental contained in the lease.

Because of these suggestions we submit that this case is entirely different from, and is not within the reasoning upon which, the Federal Oil case was decided.

But the fundamental error made by the Court of Appeals was this: In the Federal Oil case the decision went upon the ground of mutuality of obligation; this the court found to be entirely lacking. In the present case we are denied relief by the Court of Appeals because of a lack of mutuality of remedy.

The rule in the Federal Courts is clearly and concisely stated by Judge Lowell in the *Buttonhole case* (Vol. 22, Fed. Cases, No. 12,904) thus:

"It was formerly thought that an injunction would not be granted to restrain the breach of any contract, unless the contract were of such a character that the court could fully enforce the performance of it on both sides. Upon this ground there were many decisions refusing to interfere with contracts for personal services, however flagrant might be the breach of them. * * * But all these cases were overruled by one of the ablest chancellors who has adorned the woolsack in *Lumley vs. Wagner*, 1 De Gex, M. & G., 616. * * * It is now firmly established that the court will often interfere by injunction when it cannot decree performance."

After carefully examining the cases, Judge Lowell sums up the doctrine upon this point as follows :

“I think the fair result of the later cases may be thus expressed : If the case is one in which the negative remedy of injunction will do substantial justice between the parties, by obliging the defendant either to carry out his contract or lose all benefit of the breach, and the remedy at law is inadequate, and there is no reason of policy against it, the court will interfere to restrain conduct which is contrary to the contract, although it may be unable to enforce a specific performance of it.”

In that case defendant made a contract with the plaintiff whereby the latter was constituted the sole and exclusive agent for the sale of button hole machines made by the defendant under patents owned by it. The defendant refused to deliver any more machines to plaintiff and was taking measures to avoid carrying out the contract. On bill filed the court granted an injunction. The contract in that case also contained a provision whereby the complainants were entitled to terminate the contract at any time, and it was claimed that a decree should be refused because of lack of mutuality. Upon this branch of the case Judge Lowell said :

“Supposing the stipulation to mean, what the defendants contend it does, that the complainant may renounce at any time, which may be doubted, still, if the defendants, for valuable considerations, have given the complainant an exclusive license until it forfeits it, I do not see why a court of equity should not protect that license by its injunction, as usual, so long as it is not forfeited. A very strong

case was cited from (*Marble Co. vs. Ripley*), 10 Wall. (77 U. S., 339), in which the Supreme Court refused to decree the specific performance of a contract for quarrying marble, etc., on the ground, among several others, that the plaintiff had the right to give up the arrangement on a year's notice.

I cannot think that the Court intended to announce any general proposition that they would never enforce a contract which one party had a right to put an end to in a year. Everything must depend upon the nature and circumstances of the business.

In many of the cases that I have cited, the plaintiff had it in his power to end the contract. It is certainly competent to the parties to make a contract which will be equitable and reasonable, and in which their rights ought to be protected while they last, though it may be terminable by various circumstances, and though one party may have the sole right to terminate it, provided their stipulation is not one that makes the whole contract inequitable.

The remedy by injunction is a very elastic and adaptable one, and there is no sort of difficulty in granting it, until, by a change of circumstances, it shall appear that it ought to be dissolved. A bill may be retained for that purpose, for any number of years that may be requisite."

In *Western Union Telegraph Company vs. Union Pacific Railway Co.*, 3 Federal Rep., 423, a bill was filed by the Telegraph Company against the Railroad Company to protect itself in the operation of certain telegraph lines which had been erected under contract

between the parties. The Court—while holding the contract, by reason of its character, to be one under which specific performance could not be decreed—granted an injunction, and in the opinion Circuit Judge McCrary says:

“It is insisted by counsel for defendants that the contract set out in the bill (assuming its validity) is one which requires the performance of continuous duties, involving the exercise of skill, personal labor, and cultivated judgment; and that, therefore, a court of equity will neither decree its specific performance, nor enjoin its violation. That the contract is in its nature incapable of being enforced by a decree for specific performance is very clear (*Marble Co. vs. Ripley*, 10 Wall., 339); but it does not follow that a party to such a contract can have no injunction to restrain its breach. It is now settled, I think, by the decided weight of authority, that in such cases, although the affirmative specific performance of the contract is beyond the power of the court, its performance will be negatively enforced by enjoining its breach. *Pomeroy on Specific Performance*, Secs. 24, 25, 310, 311 and 312, and cases cited.”

To the same effect are:

Goddard vs. Wilde et al., 17 Fed., 845;

Chicago, etc., Ry. Co. vs. New York, L. E. & W. R. Co., 24 Fed., 516;

General Elec. Co. vs. Westinghouse Elec. Co., 151 Fed., 664.

In this court the same doctrine is recognized and applied in *Joy vs. St. Louis*, 138 U. S., 1, where an injunction was granted requiring one railroad company to permit another to use certain tracks in pursuance of a contract, although the right of the second company to continue such use was optional on its part.

In *Franklin Telegraph Company vs. Harrison*, 145 U. S., 459, the Telegraph Company made a contract with the plaintiff regarding the construction of a special wire, with the provision that after ten years the wire should belong to the Telegraph Company, but the plaintiff should have the right to use the same by paying \$600.00 annually. The Court held that under this contract, after ten years, the plaintiff was entitled to purchase the use of the wire from year to year by making annual payments. While the plaintiff could have terminated the contract at the end of any year, and the defendant could not, from the very nature of the contract, have compelled plaintiff to perform it, the Court held that it could and would grant an injunction restraining the Telegraph Company from preventing plaintiff from using that wire.

A good deal of the confusion existing in oil and gas cases has come about (1) by the failure to observe the essential distinction between the principles applicable in certain classes of cases of specific performance and the principles applicable in cases of injunctions to restrain or compel the performance of some contractual act or duty; (2) *failure to observe the essential difference between cases where an injunction has been refused because of the existence in the defendant of a power of revocation absolute in its character whereby he could immediately defeat the decree, and those cases*

where the power of revocation was in the plaintiff; and (3) the attempt to apply to cases broad, general statements of doctrine found in the text writers, without having due regard to the facts of the particular case.

A very concise discussion showing the lack of accuracy in the general statements of the text writers is found in an article by Professor Ames in 3 *Columbia Law Review*, 1, where after quoting the general doctrine of mutuality as stated by Fry, Professor Ames points out *eight* classes of cases in which relief is granted by injunction to one party to a contract and not to the other and which classes must be excepted out of the alleged general rule as stated by Fry.

Then, too, as to the power of revocation in the defendant, there are some cases, such as *Southern Express Co. vs. Railroad Co.*, 99 U. S., 191, in this court where an injunction has been refused on that ground; while there is the other class like *Franklin Telegraph Co. vs. Harrison*, 145 U. S., 459, where an injunction has been granted to a plaintiff who had the right to terminate the contract. But certainly there is a marked difference as respects specific performance where power of revocation is in the party *seeking* specific performance and where it is in the party *resisting*. In the latter case there is no reason why the court should make a decree which the defendant may at once annul. But where the power of revocation is in the plaintiff, it is not to be assumed that the party seeking performance will, as soon as the decree is made, assert his power of revocation and destroy the decree; and if he did, why should the defendant complain?

But perhaps the most misleading element has been the confounding of suits for an injunction to restrain specific acts with suits for specific performance. The distinction between the cases is concisely stated by the Vice Chancellor in *Great Northern Ry. Co. vs. Manchester, etc., Ry. Co.*, 5 DeG. & S., 138, where two railway companies entered into an agreement in writing that each of the companies should interchangeably use the railway of the other on certain terms, and the bill was filed by one company to restrain the other from preventing the plaintiffs from running engines and cars over a portion of the defendant's road in accordance with the agreement. The Vice Chancellor, in granting the injunction, said:

"Then it was suggested, that this was an agreement which could not be specifically performed, and therefore that there could be no injunction granted. Now, it does not appear to me that this is a question of specific performance at all. The defendants assert that there is no agreement binding upon them; and they assert a right of acting as if there were no agreement. The question between the parties here is, not as to the mode of enjoying the agreement, supposing the agreement exists; but it is, whether the agreement is or is not valid, or does or does not exist at all. There was a case, *Dietrichsen vs. Cabburn*, (a), which seems to be very much in point upon this question. Lord Cottenham said in that case, 'The jurisdiction of the Court to restrain by injunction an act, which the defendant is bound by contract to abstain from, is not confined to cases in which there are either no executory terms in the contract, or none which a Court of equity has not the means of enforcing.' It was asserted there,

that, because this Court could not specifically perform the whole of the agreement between the parties in all its terms, therefore it would not interfere to restrain one of the parties from acting contrary to the agreement; and his Lordship said, that a question of this kind had nothing to do with the question of specific performance."

To like effect is the very recent case of *Jones vs. Earl of Tankerville*, Law Reports, Chan. Div., 1909, vol. 2, p. 440.

Now in the present case, it is manifest that the real parties to the contest are two rival lessees. The only relief sought against the lessor is an injunction restraining him from aiding and assisting the second lessees in keeping the petitioners out of the possession of the property. There is nothing in this which savors of true specific performance. On the contrary, it is at most a suit for an injunction to restrain the lessor from violating a specific covenant implied in the lease, viz., the covenant for quiet enjoyment just as would be a suit to prevent by injunction a lessee from violating a covenant against an assignment of the lease.

If, instead of filing their bill in equity, the petitioners had forcibly dispossessed the respondents and taken and held possession of the property, thereby compelling the respondents to come into court, what would have been the result? As the respondents' leases contain the same surrender clause as is contained in the petitioners' leases, the Court under the ruling of the Circuit Court of Appeals would have been required to refuse

equitable relief; while the present petitioners, holding under leases adjudged valid and binding by the Supreme Court of Illinois, would have been rightfully in possession of their own property.

Now because they did not resort to force but sought in the courts of justice a remedy for the invasion of their legal rights, is it possible that they are by the decree of a Court of Equity to be placed in a worse plight than if they had resorted to force?

We submit that in cases of this kind the only question raised by the presence of the surrender clause is as to the *fairness* of the contract, and when the Court finds, as in the present case, that such a clause is usual in contracts of this character and that it is not unfair or inequitable, it is its duty to grant equitable relief.

That the rule applied to this case by the Circuit Court of Appeals has no proper application to the case, as it seems to us, appears from this further thought.

The purpose of the surrender clause, as shown, is to protect the lessee as against being bound to continue future rental payments after he is satisfied that the property is not oil or gas producing. That question being determined in the present cases, before final hearing in the court below, petitioners filed in the cause a stipulation, duly signed, waiving and renouncing any benefit or advantage under the surrender clause. So that at the date of the entry of the decree the present leases could have been specifically enforced as against petitioners.

Now even under the decisions of the Supreme Court of Illinois it is held that it is lack of mutuality at the time of the entry of the decree and not lack of mutuality at the time of the making of the contract which prevents relief.

Gibson vs. Brown et al., 214 Ills., 330.

Cohen vs. Siegel, 253 Ills., 34.

Therefore, at the date of the decree made by the court below the question of want of mutuality by reason of the presence of the surrender clause had wholly ended.

Our further purpose in filing this stipulation was to meet and answer the purely theoretical argument made, that the court's decree might be a vain thing because of petitioners' right to surrender and the suggestion that, after the decree, the petitioners might at any time avail themselves of the surrender clause and leave the lessor without anybody in the operation of the property. The argument is purely theoretical. The property is developed oil-producing property. That the petitioners would or could avail themselves of the surrender clause under such circumstances is a contingency utterly unreasonable to anticipate. And in the administration of justice in a Court of Equity a chancellor is never blind to the practical and real conditions to which his decree is to be applied. Refined hypothetical and purely theoretical ideas should not be allowed to prevent the entry of a decree upon the facts as they appear and the practical conditions upon which reasonable men act. In order to deprive such arguments, however, of any force and effectively protect the lessors we

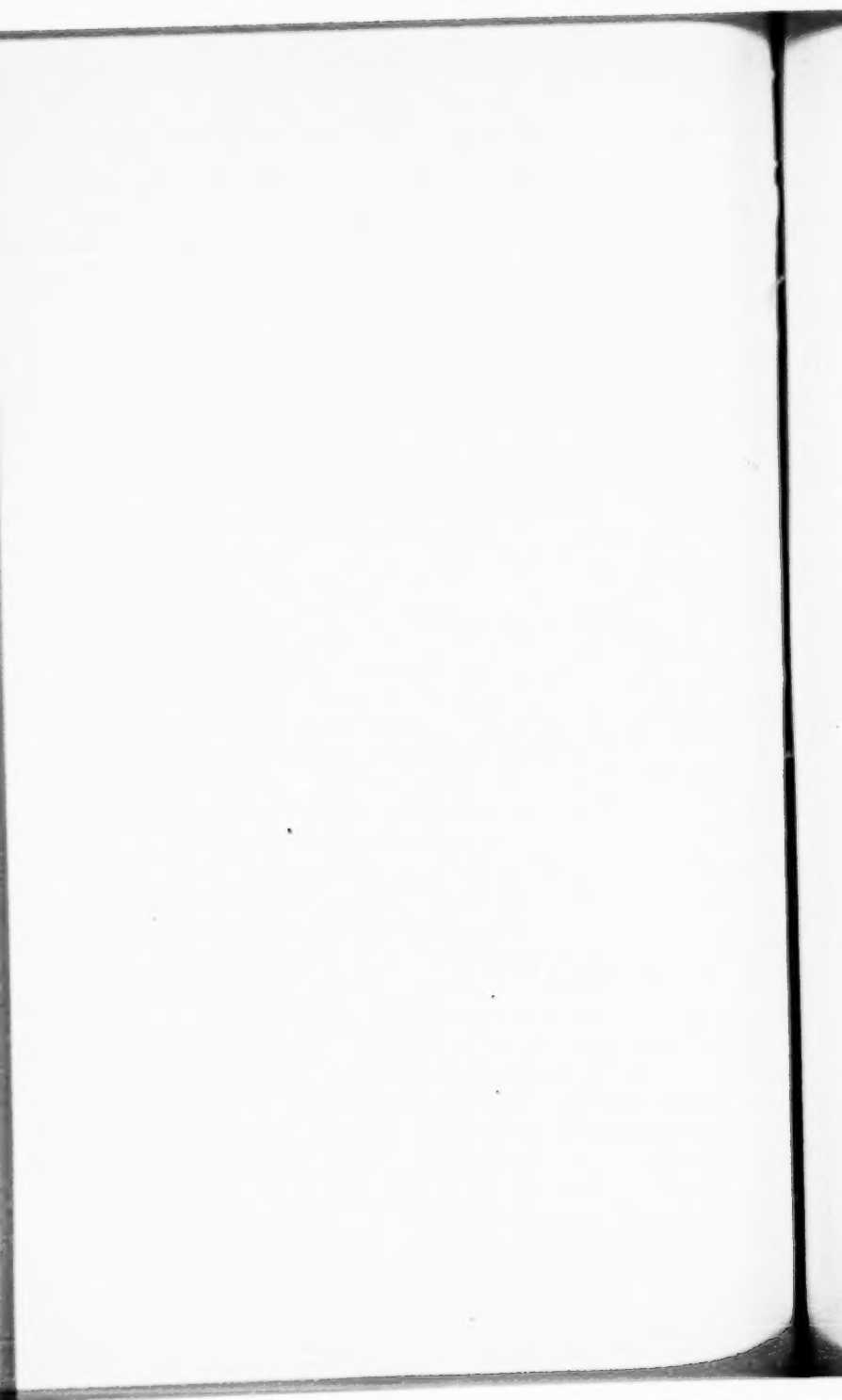
filed the stipulation referred to, and submit that upon that ground alone the decree of the Circuit Court of Appeals might well be reversed and the decree of the Circuit Court affirmed.

JOSEPH W. BAILEY,

ROBERT J. DODDS,

J. H. BEAL,

Attorneys for Petitioners.



FILED.

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JAN 21 1913

JAMES H. McKENNEY,

CLERK.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1912.

No. ~~999~~ **409** 86

JOSEPH F. GUFFEY, A. S. GUFFEY, E. N. GILLESPIE
ROBERT PITCAIRN, JR., co-partners, trading as
GUFFEY, GILLESPIE & PITCAIRN,
Petitioners,

vs.

JAMES A. SMITH, J. W. SOLLEY, C. F. JOHNSON,
WALTER HENNIG and THE OHIO OIL
COMPANY, Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE SEVENTH CIRCUIT.

JOSEPH W. BAILEY,
LEVY MAYER,
J. W. MOSES,
J. H. BEAL,

Attorneys for Petitioners.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1912.

No. 902.

JOSEPH F. GUFFEY, A. S. GUFFEY, E. N. GILLESPIE
ROBERT PITCAIRN, JR., co-partners, trading as
GUFFEY, GILLESPIE & PITCAIRN,
Petitioners,

vs.

JAMES A. SMITH, J. W. SOLLEY, C. F. JOHNSON,
WALTER HENNIG and THE OHIO OIL
COMPANY, Respondents.

*To the Honorable, the Chief Justice, and the Associate
Justices of the Supreme Court of the United States:*

Your Petitioners, Joseph F. Guffey, A. S. Guffey, E. N. Gillespie and Robert Pitcairn, Jr., co-partners, trading as Guffey, Gillespie & Pitcairn, respectfully petition for a writ of *certiorari* to the United States Circuit Court of Appeals for the Seventh Circuit, to review a decree of that court reversing a decree of the Circuit Court of the United States for the Eastern District of Illinois in favor of complainants, petitioners here, and remanding the cause with directions to dismiss the bill for want of equity.

GROUND ON WHICH PETITION IS BASED.

This petition is based on three grounds—

(1) The diversity of decisions of the courts upon the question involved.

(2) The inherent importance of the question, both as a question of law and in its commercial aspects.

(3) Because if the decree sought to be reviewed shall stand, it will revolutionize the conduct of, and work irreparable injury to, the oil and natural gas producing business not only of petitioners, but of all other persons similarly engaged.

STATEMENT OF THE CASE.

On March 24, 1908, your Petitioners filed in the Circuit Court of the United States for the Eastern District of Illinois, a bill in equity against James A. Smith, J. W. Solley, C. F. Johnson, Walter Hennig, The Ohio Oil Company and others, setting forth, *inter alia*, that your Petitioners were the owners of an oil and gas lease made by James A. Smith to M. A. Walton on May 22, 1905, of a tract of land containing about ninety acres, situate in Crawford County, Illinois, which lease and the assignments thereof vesting title thereto in your Petitioners had been duly recorded, the payments of rental thereon duly made, and the other covenants thereof kept by Petitioners; that subsequently thereto, on or about August 31, 1906, the said James A. Smith had made a *similar lease of the*

same tract of land which, by assignment, became vested in the Respondents, Solley, Johnson and Hennig, who had entered upon the said tract of land and were proceeding to operate for oil and gas. The bill prayed an injunction and an accounting.

After a full hearing upon bill, answer and testimony, the Master recommended, and the Circuit Court entered, a decree in favor of your Petitioners, restraining the Respondents, Solley, Johnson and Hennig, from interfering with your Petitioners in entering upon said lands and operating the same for oil and gas purposes, and also for an accounting and restraining the Respondent Smith from aiding and assisting the other Respondents in keeping Petitioners out of possession.

The said Respondents appealed to the United States Circuit Court of Appeals for the Seventh Circuit, and that Court, on October 1st, 1912, handed down an opinion reversing the decree entered by the Circuit Court and directing that Petitioners' bill be dismissed. The mandate pursuant to the order of the Circuit Court of Appeals has been withheld ninety days, to permit the presentation of this petition. As the jurisdiction of the Circuit Court was based entirely on diversity of citizenship, the decree of the Circuit Court of Appeals is final unless reviewed by this Court on *certiorari*.

THE DECISION SOUGHT TO BE REVIEWED.

The decision of the Circuit Court of Appeals as shown by a copy of its opinion hereto attached, was based solely upon the ground that your Petitioners were

not entitled to equitable relief because the lease held by them contains what is known as a "surrender clause," which is in the following words:

"Upon payment of One Dollar at any time by the part of the second part, heirs, successors, or assigns, to party of the first part, heirs, successors or assigns, said party of the second party, heirs, or assigns shall have the right to surrender this lease for cancellation, after which all payments and rentals thereafter to accrue under and by virtue of its terms shall cease and determine, and this lease become null and void."

The Circuit Court of Appeals in denying to Petitioners equitable relief, did so because it felt itself bound by a prior decision of that court in the case of the *Federal Oil Company vs. Western Oil Company*, 121 Fed., 647.

That decision is based on the proposition that a court of equity will not grant relief by injunction when there is not in the contract between the parties such mutuality that the same remedy can be afforded each for a breach by the other—a proposition which it is submitted is fundamentally, logically and legally unsound. This question is discussed in the brief filed with this petition.

The "surrender clause" is found in practically all oil and gas leases, including leases by the Government of Indian lands.

This so-called surrender clause is the usual one to be found in substantially all oil and gas leases, and is a fair and equitable provision, as found by the Master (Record, 435).

In the Record (pages 268-306) will be found the testimony of a number of men of long experience in the oil and gas business, and whose experience covers practically all of the principal oil fields in the United States. Their testimony shows, and the fact is, that the practice of paying a rental, usually per acre, for delay in drilling wells, prevails universally in the oil and gas business and has for many years. It is estimated that the rentals paid in West Virginia alone exceed a million and a half to two million dollars a year (Record, page 269). The business is of such a hazardous character that the early developer of any field must, in view of the expense involved, be assured of a considerable block of leases, and in view of the rental payments, in case the territory is proven unprofitable, he must have some means of relieving himself from continuing to pay rentals. It is the object of the surrender clause to accomplish this fair result.

Companies engaged in supplying gas, and in the oil business, necessarily require some assurance as to their future supply, and for this reason it is necessary to lease lands considerably in advance of actual operations. *It is impracticable to drill all the property which may be held under lease as soon as it is leased, and no good result would follow such a course. On the contrary, the result would be a tremendous overproduction of oil and gas, and, especially in the case of gas, a tremendous loss.*

In view of these conditions, it is impracticable to carry on the oil and gas business without such protection as is afforded by the surrender clause; and the evidence shows that it is a fair provision, benefits the land owner in that it gives him an income while his property is being held pending development, and at the

same time protects the operator in case the property should prove valueless for oil or gas purposes.

As evidencing that a surrender clause is not an inequitable provision in an oil and gas lease, all leases made by the Interior Department for the leasing of Indian lands for oil and gas purposes contain a surrender clause. Such a clause in the form of lease recently prescribed by the Department for the leasing of the Osage lands, is as follows:

"The lessee may, at any time, by paying to the Indian superintendent all amounts then due as provided herein and the further sum of \$1, surrender all or any part of the land covered by this lease and have the lease canceled as to the land surrendered and be relieved from all further obligations and liabilities thereunder as to the part surrendered: *Provided*, That in the event the lease is surrendered for cancellation in whole or in part after a new lease year has been entered upon, the lessee and the surety shall be held liable for the advance rentals required to be paid for that year, and no part of such rentals which may have been paid shall be refunded."

In the present case the leased premises having proved oil producing property, your Petitioners, prior to the hearing of the case, filed in the court below a stipulation waiving and renouncing any benefit or advantage of the said surrender clause. (By inadvertence this stipulation was omitted from the printed record, but a copy of it is attached to this petition.)

EFFECT OF THE DECISION BELOW.

The question involved in this cause as to the right of a lessee under such a lease to a remedy in equity is of the

utmost importance not to your Petitioners alone, but to all persons engaged in the oil and gas business. If the decision of the court below be sustained, the result will be irreparable injury to those engaged in the business. Attention is directed to the following paragraph from the report of the Master in this case (Record 443):

"If such were the law, no oil or gas company developing lands under a lease containing a surrender clause would be secure for a moment, as another oil company, under a similar lease, could, with the connivance of the owner of the land, dispossess the first operator by force, and the latter would be deprived of any remedy whatever in the courts. Such a state of affairs, instead of producing any relief, would be a source of disorder and contention, and in many instances doubtless the cause of armed conflict."

As indicating the importance to the oil industry of the question here involved, the recent census of the United States shows that of 14,072,064 acres of oil producing lands 13,385,796 acres are held under lease, only 686,268 being owned in fee.

PETITIONERS HAVE ACTED DILIGENTLY AND IN GOOD FAITH THROUGHOUT.

At the time Petitioners' lease was taken (May 22, 1905, Record, 76), the nearest well was fifteen miles away (Record, 71). As late as June, 1906, there was no pipe line within fifteen miles of the property (Record, 265). It was not until the Fall of 1906 that any developments reached the vicinity of the Smith property (Record, 212).

Not only have Petitioners fully kept and performed the covenants contained in said lease, but no facts have been alleged or shown raising any implied covenant sooner to operate said premises; nor does any question arise of *diligence* in performance, or of *obligation* to drill said lands for the protection thereof by reason of operations on adjoining properties.

The Master found (Record, 436) :

"The Master further finds that the complainants have been at all times financially responsible and able to perform the covenants of their lease, that they have not drilled a well on said premises, but that they have paid all the rentals required by the terms of said lease to be paid, at the rate of twenty-five cents per acre, and deposited the same in the bank designated in the lease to receive the same, for the owner of the land."

The Respondents' lease is dated August 9, 1906, and was acknowledged and delivered August 31, 1906, but the lease, and the assignment to Willet, were not recorded until January 28, 1907. The lease was taken with full knowledge of the Petitioners' lease. In the Fall of 1906 Willet completed a gas well on the James A. Smith property. The Petitioners were unable to learn who had drilled the well until the lease was filed of record on January 28, 1907. On March 25, 1907, the lease was assigned to the Respondents Solley and Johnson, Willet guaranteeing title under the lease.

As soon as Respondents' entry upon the property was known to Petitioners, they caused written notice of their rights to be served, placed the matter

in the hands of counsel, and a bill in equity was first filed in the state court, which was subsequently discontinued, and the present bill immediately filed.

CONFLICT IN DECISIONS.

Petitioners further show that they are advised by counsel and aver that there exists a diversity of decisions respecting the question now presented to this Court. In West Virginia (*Pyle vs. Henderson*, 65 W. Va., 39), Ohio (*Gas Co. vs. Eckert*, 70 Ohio St., 127) and Louisiana (*Busch Everett Co. vs. Vivian Co.*, 128 La., 886) it has been decided that leases containing a surrender clause are enforceable in equity, and such leases have also been enforced in equity in the Federal Courts. In Illinois (*Ulrey vs. Keith*, 237 Ill., 284) and in Oklahoma (*Kolschny vs. Galbraith*, 26 Ok., 772) it has been held that such leases are valid, but that the presence of the "surrender clause" deprives the lessee of a remedy in equity. The present case is the first one in which this question has been squarely presented for decision in the Federal Courts—unless it may be said to be involved in the *Federal Oil case* (121 Fed., 674).

The conflict in views of the courts, Federal and State, on the question, and the repugnancy of the decree of the Circuit Court of Appeals in the principles of law involved to the decisions of this Court, as well as a discussion of the true rule of law applicable, are set forth in the brief accompanying this petition.

For the purpose, therefore, of establishing uniformity of decision, of preventing grave injury to and confusion in a great industry, and litigation which is

certain to result from the decision below, unless its doctrine shall have the approval of this Court, it is submitted that a writ of *certiorari* should issue.

JOSEPH W. BAILEY,
LEVY MAYER,
J. W. MOSES,
J. H. BEAL,
Attorneys for Petitioners.

*State of Pennsylvania, }
County of Allegheny, } ss:*

E. N. Gillespie, being duly sworn, deposes and says that he is a member of the firm of Guffey, Gillespie & Pitcairn and one of the within named Petitioners, and that the statements of fact contained in the foregoing Petition, in so far as they are of his own knowledge, are true, and in so far as they are made upon information received from others, he verily believes them to be true.

E. N. GILLESPIE.

Sworn and subscribed before me this 17th day of January, A. D. 1913.

[SEAL] L. H. DIERKEN,
*Notary Public in and for Allegheny
County, Pennsylvania.*

My commission expires Feb. 21, 1915.



APPENDIX.

IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SEVENTH CIRCUIT.

Nos. 1856, 1857.

October Term.

January Session, A. D. 1912.

No. 1856.

JAMES A. SMITH, ET AL.,

Appellants,

vs.

JOSEPH F. GUFFEY, ET AL.,

Appellees.

} Appeal from the Circuit
Court of the United
States for the Eastern
District of Illinois.

No. 1857.

SUSANNAH SMITH, ET AL.,

Appellants,

vs.

JOSEPH F. GUFFEY, ET AL.,

Appellees.

} Appeal from the Circuit
Court of the United
States for the Eastern
District of Illinois.

Before KOHLSAAT and MACK, Circuit Judges, and
SANBORN, District Judge.

MACK, Judge:

The question presented in these cases is whether or not lessees under such oil and gas leases as those under which appellees (complainants in the Circuit Court) claim, will be given the aid of a court of equity, prior to the discovery by them of any oil or gas, for the protection and enforcement of the rights thereby conferred upon them to enter the property and to prospect for oil and gas, as against their lessors and the latter's grantees under subsequent leases taken with notice of

the prior leases, who have entered upon the premises, dug wells and are barring out the first lessees.

This exact question has been decided against the first lessees under a form of lease identical with those before us, by the Supreme Court of Illinois in *Ulrey vs. Keith*, 237 Ill., 284; 86 N. E. Rep., 696. In this case, the Court, notwithstanding the conceded validity of the lease at law, and its refusal in *Poe vs. Ulrey*, 233 Ill., 56, 84 N. E. Rep., 46, at the suit of the lessor, to cancel and annul it in equity, nevertheless denied the lessee the aid of a court of equity in the affirmative enforcement of his legal rights thereunder and remitted him to his admittedly inadequate remedy at law.

The only decision, brought to our attention, in which the lessee under such a lease has been aided in equity, is *Pyle vs. Henderson*, 65 W. Va., 39, 63 S. E., 762. The views of the Illinois court are strongly criticised in 3 Ill. Law Rev., 43, 601, 608.

While the construction given by the Supreme Court of Illinois to such a lease would be followed by this court, involving as it does a question of local law, its decision as to the legal rights thereby granted would not be binding upon us. We should therefore be free to consider the question on its merits, unless we are concluded by the decision of this court in *Federal Oil Co. vs. Western Oil Co.*, 121 Fed., 674, affirming the decision rendered by Judge Baker in the Circuit Court for the District of Indiana, 112 Fed., 373, dismissing a bill brought by a lessee under similar circumstances, and thereby denying to him the aid of a court of equity.

That the one is an Indiana while the other is an Illinois lease, is not material, inasmuch as the Indiana

courts likewise regard the lease as valid at law and likewise refuse, at the suit of the lessor, to annul it in equity. *New American Oil & Mining Co. vs. Troyer*, 166 Ind., 402, 77 N. E., 739. The terms and provisions of the two leases must therefore be compared in order to determine whether or not the Federal Oil Co. case is distinguishable.

They differ in two respects:

First. The Indiana lease contains no counterpart to the following clause found in the Illinois lease:

"It is agreed that this lease shall remain in force for the term of five years from this date, and as long thereafter as oil or gas, or either of them is produced therefrom by the" lessee.

Second. Each lease recites a consideration for the grant; in the Indiana lease it is one dollar (\$1); in the Illinois lease it is one dollar (\$1) "and the covenants and agreements hereinafter contained on the part of the" lessee.

The Indiana lease contains no express covenant of any kind to be performed by the lessee, prior to the discovery of oil or gas, but the grant is recited to be made on certain conditions. Among others, is the following:

"In case no well is commenced within one day from this date, then this grant shall become null and void unless second party shall thereafter pay at the rate of \$8.75 for each month such commencement is delayed in advance."

The Illinois lease contains the following express covenant:

"Second party covenants * * * to complete a well on said premises within nine months from the date

hereof, or pay at the rate of 25 cents per year quarterly in advance for each additional three months such completion is delayed from the time above mentioned for the completion of such well until a well is completed."

We shall assume that 25 cents per acre was intended by the parties.

The Indiana lease further provides that "the second party may cancel and annul this contract or any part thereof at any time," while under the Illinois lease "the second party, upon the payment of one dollar (\$1) at any time by the party of the second part, heirs or assigns, shall have the right to surrender this lease for cancellation, after which all payments and liabilities thereafter to accrue under and by virtue of its terms shall cease and determine and this lease become absolutely null and void."

Are these differences in the two leases real and therefore controlling or only apparent and therefore negligible?

First. The omission of a fixed minimum period in the Indiana lease does not render it void. The only effect is to make the period for prospecting a reasonable, instead of a fixed minimum time. While a "reasonable time" to enter the premises and prospect thereon is in a sense uncertain, vague and indefinite, and in these cases, dependent upon all of the surrounding circumstances, nevertheless the lessee under such a lease acquires substantial rights, rights which, while they endure, will receive the same consideration and protection, at law and in equity, as will those of a lessee whose period for entry and prospecting is definitely

fixed. This has been expressly held in *New American Oil & Mining Co. vs. Troyer*, 166 Ind., 402, 76 N. E., 253, and in other cases therein cited.

Second. A nominal consideration is sufficient at law; equity requires a substantial consideration. In both cases, the purpose of the grant is to secure for the lessor not the one dollar, but the oil and gas. In both, the lessee covenants to pay over a percentage of any oil produced and to make substantial annual payments for any gas marketed.

As a consideration, however, for the right to enter and prospect until oil or gas shall be found, the Indiana lessee has paid only the nominal sum of one dollar; he has not entered into any covenants as an additional consideration for this right. True, he may lose his rights unless he performs the condition of digging a well or of making the specified monthly payments, but the lessor cannot compel him by suit either to make the payments or to dig a well. The option is with the lessee. This results, moreover, not only from his failure to make any such promise, and from the substitution of a condition for a covenant, but also from the express provision whereby the lessee could annul the contract at any time.

The Illinois lessee, on the other hand, must, apparently at least, either dig a well within nine months or pay the specified sum quarterly in advance for at least five years unless in the meantime he shall have dug a well. And if this apparent obligation were actually enforceable, there would be no difficulty in distinguishing the Indiana lease case and in protecting the prior lessee in equity, as was done in *Gillespie vs. Fulton*

Oil & Gas Co., 236 Ill., 188, 86 N. E., 219, decided less than two months before *Ulrey vs. Keith*, *supra*.

Is this obligation of these Illinois lessees, however, really or only apparently enforceable?

The surrender clause gives them the right at any time before or after the expiration of the nine months, to absolve themselves from any further liability. If they exercise this right, if they surrender the lease as at their absolute option they are empowered to do, they are thereafter just as free from any obligation enforceable by the lessor, as is the Indiana lessee. True, they must pay one dollar and perhaps make an actual surrender, but this purely nominal obligation cannot change the rights of the parties in a court of equity.

That the complainants long after defendants had discovered oil and gas on the premises, in fact, after the testimony in the case had been taken, filed a so-called stipulation, waiving this right to surrender, a right no longer of the slightest value, cannot retroactively perfect the lease or the bill of complaint.

Inasmuch, therefore, as there is no substantial distinction between the present cases and the Federal Oil Co. case, the decree of the Circuit Court must be reversed and the causes remanded to the District Court for the Eastern District of Illinois, with direction to dismiss the bills of complainant for want of equity.

A true Copy.

Teste:

*Clerk of the United States Circuit
Court of Appeals for the
Seventh Circuit.*

STIPULATION.

And now, November 1st, 1909, come the plaintiffs, Joseph F. Guffey, A. S. Guffey, E. N. Gillespie and Robert Pitcairn, Jr., co-partners trading as Guffey, Gillespie & Pitcairn, and make the following stipulation:

It appearing that the lease involved in this case, made by James A. Smith to M. A. Walton, dated May 22, 1905, and by him assigned, and which lease is now vested in the plaintiffs, contains the following clause:

“And further, upon the payment of one dollar at any time by the party of the second part, heirs, successors or assigns, to the party of the first part, heirs, successors or assigns, shall have the right to surrender this lease for cancellation, after which all payments and liabilities thereafter to accrue under and by virtue of its terms, shall cease and determine, and this lease become absolutely null and void.”

And it appearing from the evidence in this case that the reason for the insertion of said clause in the said lease was to enable the lessee and his assigns to protect themselves from the obligation to pay rental, in case the property covered by the lease should subsequently within the term of the lease prove to be valueless as oil-producing property, and it further appearing by the evidence that the property has proven to be oil-producing property, and the reason for the insertion of said surrender clause has ceased to exist, the plaintiffs do hereby waive and renounce any and all further or other benefit or advantage whatsoever for or by reason of the existence in said lease of the clause

above mentioned; and do hereby further stipulate and agree that they will not, in any manner, shape or form, exercise or take any benefit or advantage whatsoever of or from said clause.

(Signed) GUFFEY, GILLESPIE & PITCAIRN,
JOSEPH F. GUFFEY,
A. S. GUFFEY,
ROBERT PITCAIRN, JR.,
E. N. GILLESPIE.

15-
Office Supreme Court, U. S.
FILED.

JAN 21 1913

JAMES H. McKENNEY,
CLERK.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1912.

No. ~~900~~ **410** 87

**JOSEPH F. GUFFEY, A. S. GUFFEY, E. N. GILLESPIE
ROBERT PITCAIRN, JR., co-partners, trading as
GUFFEY, GILLESPIE & PITCAIRN,
Petitioners,**

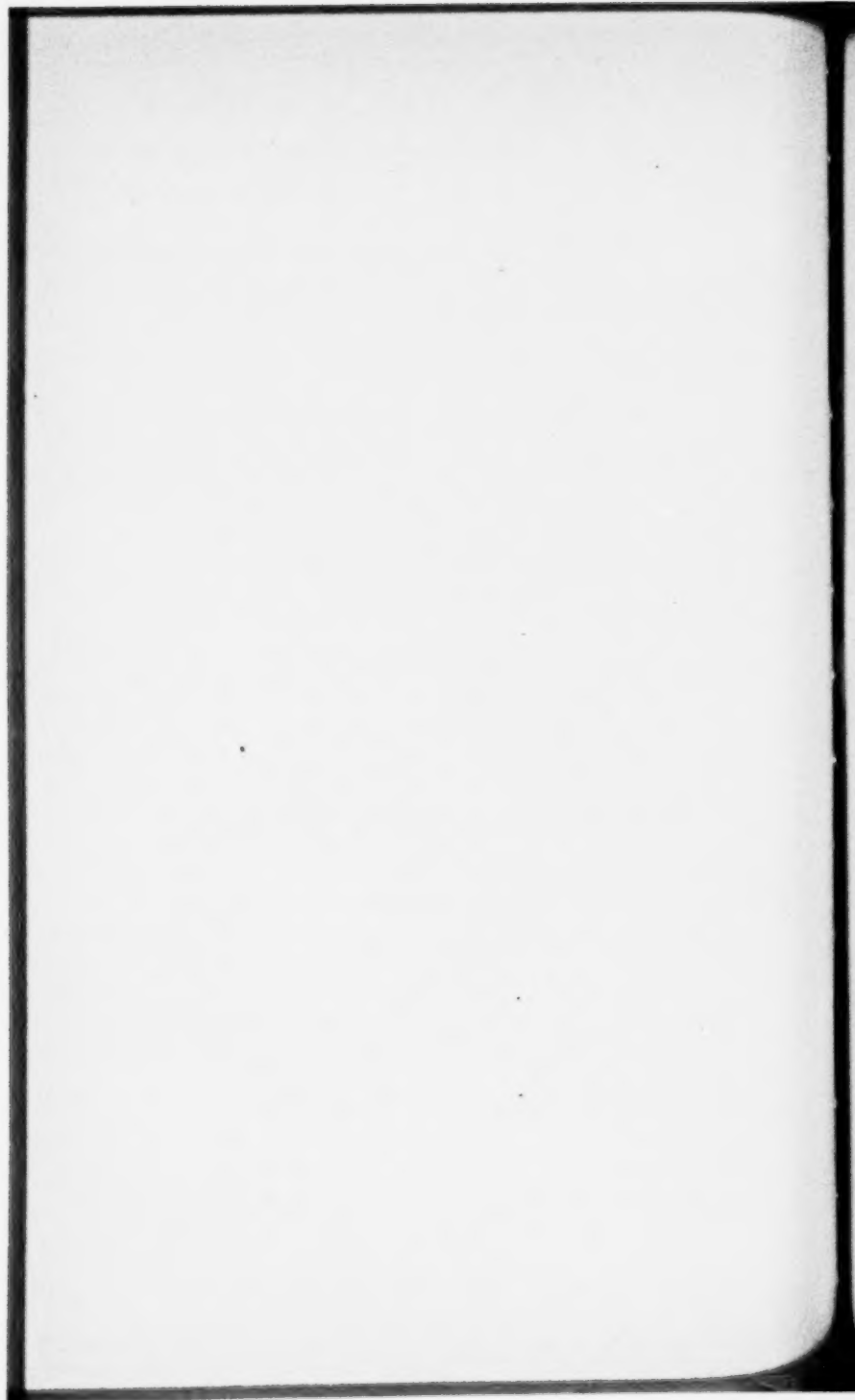
vs.

**SUSANNAH SMITH, J. W. SOLLEY, C. F. JOHNSON
WALTER HENNIG and THE OHIO OIL
COMPANY, Respondents.**

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE SEVENTH CIRCUIT.**

**JOSEPH W. BAILEY,
LEVY MAYER,
J. W. MOSES,
J. H. BEAL,**

Attorneys for Petitioners.



IN THE
Supreme Court of the United States

OCTOBER TERM, 1912.

No. 903.

JOSEPH F. GUFFEY, A. S. GUFFEY, E. N. GILLESPIE
ROBERT PITCAIRN, JR., co-partners, trading as
GUFFEY, GILLESPIE & PITCAIRN,
Petitioners,

vs.

SUSANNAH SMITH, J. W. SOLLEY, C. F. JOHNSON
WALTER HENNIG and THE OHIO OIL
COMPANY, Respondents.

*To the Honorable, the Chief Justice, and the Associate
Justices of the Supreme Court of the United States:*

Your Petitioners, Joseph F. Guffey, A. S. Guffey, E. N. Gillespie and Robert Pitcairn, Jr., co-partners, trading as Guffey, Gillespie & Pitcairn, respectfully petition for a writ of *certiorari* to the United States Circuit Court of Appeals for the Seventh Circuit, to review a decree of that court reversing a decree of the Circuit Court of the United States for the Eastern District of Illinois in favor of complainants, petitioners here, and remanding the cause with directions to dismiss the bill for want of equity.

GROUNDS ON WHICH PETITION IS BASED.

This petition is based on three grounds—

(1) The diversity of decisions of the courts upon the question involved.

(2) The inherent importance of the question, both as a question of law and in its commercial aspects.

(3) Because if the decree sought to be reviewed shall stand, it will revolutionize the conduct of, and work irreparable injury to, the oil and natural gas producing business not only of petitioners, but of all other persons similarly engaged.

STATEMENT OF THE CASE.

On March 24, 1908, your Petitioners filed in the Circuit Court of the United States for the Eastern District of Illinois, a bill in equity against Susannah Smith, J. W. Solley, C. F. Johnson, Walter Hennig, The Ohio Oil Company and others, setting forth, *inter alia*, that your Petitioners were the owners of an oil and gas lease made by Susannah Smith to M. A. Walton on May 22, 1905, of a tract of land containing about ninety acres, situate in Crawford County, Illinois, which lease and the assignments thereof vesting title thereto in your Petitioners had been duly recorded, the payments of rental thereon duly made, and the other covenants thereof kept by Petitioners; that subsequently thereto, on or about August 31, 1906, the said Susannah Smith had made a *similar lease of the*

same tract of land which, by assignment, became vested in the Respondents, Solley, Johnson and Hennig, who had entered upon the said tract of land and were proceeding to operate for oil and gas. The bill prayed an injunction and an accounting.

After a full hearing upon bill, answer and testimony, the Master recommended, and the Circuit Court entered, a decree in favor of your Petitioners, restraining the Respondents, Solley, Johnson and Hennig, from interfering with your Petitioners in entering upon said lands and operating the same for oil and gas purposes, and also for an accounting and restraining the Respondent Smith from aiding and assisting the other Respondents in keeping Petitioners out of possession.

The said Respondents appealed to the United States Circuit Court of Appeals for the Seventh Circuit, and that Court, on October 1st, 1912, handed down an opinion reversing the decree entered by the Circuit Court and directing that Petitioners' bill be dismissed. The mandate pursuant to the order of the Circuit Court of Appeals has been withheld ninety days, to permit the presentation of this petition. As the jurisdiction of the Circuit Court was based entirely on diversity of citizenship, the decree of the Circuit Court of Appeals is final unless reviewed by this Court on *certiorari*.

THE DECISION SOUGHT TO BE REVIEWED.

The decision of the Circuit Court of Appeals as shown by a copy of its opinion hereto attached, was based solely upon the ground that your Petitioners were

not entitled to equitable relief because the lease held by them contains what is known as a "surrender clause," which is in the following words:

"Upon payment of One Dollar at any time by the part of the second part, heirs, successors, or assigns, to party of the first part, heirs, successors or assigns, said party of the second party, heirs, or assigns shall have the right to surrender this lease for cancellation, after which all payments and rentals thereafter to accrue under and by virtue of its terms shall cease and determine, and this lease become null and void."

The Circuit Court of Appeals in denying to Petitioners equitable relief, did so because it felt itself bound by a prior decision of that court in the case of the *Federal Oil Company vs. Western Oil Company*, 121 Fed., 647.

That decision is based on the proposition that a court of equity will not grant relief by injunction when there is not in the contract between the parties such mutuality that the same remedy can be afforded each for a breach by the other—a proposition which it is submitted is fundamentally, logically and legally unsound. This question is discussed in the brief filed with this petition.

The "surrender clause" is found in practically all oil and gas leases, including leases by the Government of Indian lands.

This so-called surrender clause is the usual one to be found in substantially all oil and gas leases, and is a fair and equitable provision, as found by the Master (Record, 435).

In the Record (pages 268-306) will be found the testimony of a number of men of long experience in the oil and gas business, and whose experience covers practically all of the principal oil fields in the United States. Their testimony shows, and the fact is, that the practice of paying a rental, usually per acre, for delay in drilling wells, prevails universally in the oil and gas business and has for many years. It is estimated that the rentals paid in West Virginia alone exceed a million and a half to two million dollars a year (Record, page 269). The business is of such a hazardous character that the early developer of any field must, in view of the expense involved, be assured of a considerable block of leases, and in view of the rental payments, in case the territory is proven unprofitable, he must have some means of relieving himself from continuing to pay rentals. It is the object of the surrender clause to accomplish this fair result.

Companies engaged in supplying gas, and in the oil business, necessarily require some assurance as to their future supply, and for this reason it is necessary to lease lands considerably in advance of actual operations. *It is impracticable to drill all the property which may be held under lease as soon as it is leased, and no good result would follow such a course. On the contrary, the result would be a tremendous overproduction of oil and gas, and, especially in the case of gas, a tremendous loss.*

In view of these conditions, it is impracticable to carry on the oil and gas business without such protection as is afforded by the surrender clause; and the evidence shows that it is a fair provision, benefits the land owner in that it gives him an income while his property is being held pending development, and at the

same time protects the operator in case the property should prove valueless for oil or gas purposes.

As evidencing that a surrender clause is not an inequitable provision in an oil and gas lease, all leases made by the Interior Department for the leasing of Indian lands for oil and gas purposes contain a surrender clause. Such a clause in the form of lease recently prescribed by the Department for the leasing of the Osage lands, is as follows:

"The lessee may, at any time, by paying to the Indian superintendent all amounts then due as provided herein and the further sum of \$1, surrender all or any part of the land covered by this lease and have the lease canceled as to the land surrendered and be relieved from all further obligations and liabilities thereunder as to the part surrendered: *Provided*, That in the event the lease is surrendered for cancellation in whole or in part after a new lease year has been entered upon, the lessee and the surety shall be held liable for the advance rentals required to be paid for that year, and no part of such rentals which may have been paid shall be refunded."

In the present case the leased premises having proved oil producing property, your Petitioners, prior to the hearing of the case, filed in the court below a stipulation waiving and renouncing any benefit or advantage of the said surrender clause. (By inadvertence this stipulation was omitted from the printed record, but a copy of it is attached to this petition.)

EFFECT OF THE DECISION BELOW.

The question involved in this cause as to the right of a lessee under such a lease to a remedy in equity is of the

utmost importance not to your Petitioners alone, but to all persons engaged in the oil and gas business. If the decision of the court below be sustained, the result will be irreparable injury to those engaged in the business. Attention is directed to the following paragraph from the report of the Master in this case (Record 443) :

"If such were the law, no oil or gas company developing lands under a lease containing a surrender clause would be secure for a moment, as another oil company, under a similar lease, could, with the connivance of the owner of the land, dispossess the first operator by force, and the latter would be deprived of any remedy whatever in the courts. Such a state of affairs, instead of producing any relief, would be a source of disorder and contention, and in many instances doubtless the cause of armed conflict."

As indicating the importance to the oil industry of the question here involved, the recent census of the United States shows that of 14,072,064 acres of oil producing lands 13,385,796 acres are held under lease, only 686,268 being owned in fee.

PETITIONERS HAVE ACTED DILIGENTLY AND IN GOOD FAITH THROUGHOUT.

At the time Petitioners' lease was taken (May 22, 1905, Record, 76), the nearest well was fifteen miles away (Record, 71). As late as June, 1906, there was no pipe line within fifteen miles of the property (Record, 265). It was not until the Fall of 1906 that any developments reached the vicinity of the Smith property (Record, 212).

Not only have Petitioners fully kept and performed the covenants contained in said lease, but no facts have been alleged or shown raising any implied covenant sooner to operate said premises; nor does any question arise of *diligence* in performance, or of *obligation* to drill said lands for the protection thereof by reason of operations on adjoining properties.

The Master found (Record, 436) :

"The Master further finds that the complainants have been at all times financially responsible and able to perform the covenants of their lease, that they have not drilled a well on said premises, but that they have paid all the rentals required by the terms of said lease to be paid, at the rate of twenty-five cents per acre, and deposited the same in the bank designated in the lease to receive the same, for the owner of the land."

Respondents' lease is dated August 9, 1906, and was acknowledged and delivered August 31, 1906, but the lease and the assignment to Willet, were not recorded until January 28, 1907. The lease was taken with full knowledge of the Petitioners' lease. About March, 1907, the Respondents completed a well on the Susannah Smith property, and on March 25, 1907, the lease was assigned to the Respondents, Solley and Johnson, Willet guaranteeing title under the lease.

As soon as Respondents' entry upon the property was known to Petitioners, they caused written notice of their rights to be served, placed the matter

in the hands of counsel, and a bill in equity was first filed in the state court, which was subsequently discontinued, and the present bill immediately filed.

CONFLICT IN DECISIONS.

Petitioners further show that they are advised by counsel and aver that there exists a diversity of decisions respecting the question now presented to this Court. In West Virginia (*Pyle vs. Henderson*, 65 W. Va., 39), Ohio (*Gas Co. vs. Eckert*, 70 Ohio St., 127) and Louisiana (*Busch Everett Co. vs. Vivian Co.*, 128 La., 886) it has been decided that leases containing a surrender clause are enforceable in equity, and such leases have also been enforced in equity in the Federal Courts. In Illinois (*Ulrey vs. Keith*, 237 Ill., 284) and in Oklahoma (*Kolschny vs. Galbraith*, 26 Ok., 772) it has been held that such leases are valid, but that the presence of the "surrender clause" deprives the lessee of a remedy in equity. The present case is the first one in which this question has been squarely presented for decision in the Federal Courts—unless it may be said to be involved in the *Federal Oil case* (121 Fed., 674).

The conflict in views of the courts, Federal and State, on the question, and the repugnancy of the decree of the Circuit Court of Appeals in the principles of law involved to the decisions of this Court, as well as a discussion of the true rule of law applicable, are set forth in the brief accompanying this petition.

For the purpose, therefore, of establishing uniformity of decision, of preventing grave injury to and confusion in a great industry, and litigation which is

certain to result from the decision below, unless its doctrine shall have the approval of this Court, it is submitted that a writ of *certiorari* should issue.

JOSEPH W. BAILEY,
LEVY MAYER,
J. W. MOSES,
J. H. BEAL,
Attorneys for Petitioners.

*State of Pennsylvania, } ss:
County of Allegheny, }*

E. N. Gillespie, being duly sworn, deposes and says that he is a member of the firm of Guffey, Gillespie & Pitcairn and one of the within named Petitioners, and that the statements of fact contained in the foregoing Petition, in so far as they are of his own knowledge, are true, and in so far as they are made upon information received from others, he verily believes them to be true.

E. N. GILLESPIE.

Sworn and subscribed before me this 17th day of January, A. D. 1913.

[SEAL] L. H. DIERKEN,
*Notary Public in and for Allegheny
County, Pennsylvania.*

My commission expires Feb. 21, 1915.

APPENDIX.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Nos. 1856, 1857.

October Term.

January Session, A. D. 1912.

No. 1856.

JAMES A. SMITH, ET AL.,
Appellants,

vs.

JOSEPH F. GUFFEY, ET AL.,
Appellees.

} Appeal from the Circuit
Court of the United
States for the Eastern
District of Illinois.

No. 1857.

SUSANNAH SMITH, ET AL.,
Appellants,

vs.

JOSEPH F. GUFFEY, ET AL.,
Appellees.

} Appeal from the Circuit
Court of the United
States for the Eastern
District of Illinois.

Before KOHLSAAT and MACK, Circuit Judges, and
SANBORN, District Judge.
MACK, Judge:

The question presented in these cases is whether or not lessees under such oil and gas leases as those under which appellees (complainants in the Circuit Court) claim, will be given the aid of a court of equity, prior to the discovery by them of any oil or gas, for the protection and enforcement of the rights thereby conferred upon them to enter the property and to prospect for oil and gas, as against their lessors and the latter's grantees under subsequent leases taken with notice of

the prior leases, who have entered upon the premises, dug wells and are barring out the first lessees.

This exact question has been decided against the first lessees under a form of lease identical with those before us, by the Supreme Court of Illinois in *Ulrey vs. Keith*, 237 Ill., 284; 86 N. E. Rep., 696. In this case, the Court, notwithstanding the conceded validity of the lease at law, and its refusal in *Poe vs. Ulrey*, 233 Ill., 56, 84 N. E. Rep., 46, at the suit of the lessor, to cancel and annul it in equity, nevertheless denied the lessee the aid of a court of equity in the affirmative enforcement of his legal rights thereunder and remitted him to his admittedly inadequate remedy at law.

The only decision, brought to our attention, in which the lessee under such a lease has been aided in equity, is *Pyle vs. Henderson*, 65 W. Va., 39, 63 S. E., 762. The views of the Illinois court are strongly criticised in 3 Ill. Law Rev., 43, 601, 608.

While the construction given by the Supreme Court of Illinois to such a lease would be followed by this court, involving as it does a question of local law, its decision as to the legal rights thereby granted would not be binding upon us. We should therefore be free to consider the question on its merits, unless we are concluded by the decision of this court in *Federal Oil Co. vs. Western Oil Co.*, 121 Fed., 674, affirming the decision rendered by Judge Baker in the Circuit Court for the District of Indiana, 112 Fed., 373, dismissing a bill brought by a lessee under similar circumstances, and thereby denying to him the aid of a court of equity.

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courts likewise regard the lease as valid at law and likewise refuse, at the suit of the lessor, to annul it in equity. *New American Oil & Mining Co. vs. Troyer*, 166 Ind., 402, 77 N. E., 739. The terms and provisions of the two leases must therefore be compared in order to determine whether or not the Federal Oil Co. case is distinguishable.

They differ in two respects:

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"It is agreed that this lease shall remain in force for the term of five years from this date, and as long thereafter as oil or gas, or either of them is produced therefrom by the" lessee.

Second. Each lease recites a consideration for the grant; in the Indiana lease it is one dollar (\$1); in the Illinois lease it is one dollar (\$1) "and the covenants and agreements hereinafter contained on the part of the" lessee.

The Indiana lease contains no express covenant of any kind to be performed by the lessee, prior to the discovery of oil or gas, but the grant is recited to be made on certain conditions. Among others, is the following:

"In case no well is commenced within one day from this date, then this grant shall become null and void unless second party shall thereafter pay at the rate of \$8.75 for each month such commencement is delayed in advance."

The Illinois lease contains the following express covenant:

"Second party covenants * * * to complete a well on said premises within nine months from the date

hereof, or pay at the rate of 25 cents per year quarterly in advance for each additional three months such completion is delayed from the time above mentioned for the completion of such well until a well is completed."

We shall assume that 25 cents per acre was intended by the parties.

The Indiana lease further provides that "the second party may cancel and annul this contract or any part thereof at any time," while under the Illinois lease "the second party, upon the payment of one dollar (\$1) at any time by the party of the second part, heirs or assigns, shall have the right to surrender this lease for cancellation, after which all payments and liabilities thereafter to accrue under and by virtue of its terms shall cease and determine and this lease become absolutely null and void."

Are these differences in the two leases real and therefore controlling or only apparent and therefore negligible?

First. The omission of a fixed minimum period in the Indiana lease does not render it void. The only effect is to make the period for prospecting a reasonable, instead of a fixed minimum time. While a "reasonable time" to enter the premises and prospect thereon is in a sense uncertain, vague and indefinite, and in these cases, dependent upon all of the surrounding circumstances, nevertheless the lessee under such a lease acquires substantial rights, rights which, while they endure, will receive the same consideration and protection, at law and in equity, as will those of a lessee whose period for entry and prospecting is definitely

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Second. A nominal consideration is sufficient at law; equity requires a substantial consideration. In both cases, the purpose of the grant is to secure for the lessor not the one dollar, but the oil and gas. In both, the lessee covenants to pay over a percentage of any oil produced and to make substantial annual payments for any gas marketed.

As a consideration, however, for the right to enter and prospect until oil or gas shall be found, the Indiana lessee has paid only the nominal sum of one dollar; he has not entered into any covenants as an additional consideration for this right. True, he may lose his rights unless he performs the condition of digging a well or of making the specified monthly payments, but the lessor cannot compel him by suit either to make the payments or to dig a well. The option is with the lessee. This results, moreover, not only from his failure to make any such promise, and from the substitution of a condition for a covenant, but also from the express provision whereby the lessee could annul the contract at any time.

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Oil & Gas Co., 236 Ill., 188, 86 N. E., 219, decided less than two months before *Ulrey vs. Keith*, *supra*.

Is this obligation of these Illinois lessees, however, really or only apparently enforceable?

The surrender clause gives them the right at any time before or after the expiration of the nine months, to absolve themselves from any further liability. If they exercise this right, if they surrender the lease as at their absolute option they are empowered to do, they are thereafter just as free from any obligation enforceable by the lessor, as is the Indiana lessee. True, they must pay one dollar and perhaps make an actual surrender, but this purely nominal obligation cannot change the rights of the parties in a court of equity.

That the complainants long after defendants had discovered oil and gas on the premises, in fact, after the testimony in the case had been taken, filed a so-called stipulation, waiving this right to surrender, a right no longer of the slightest value, cannot retroactively perfect the lease or the bill of complaint.

Inasmuch, therefore, as there is no substantial distinction between the present cases and the Federal Oil Co. case, the decree of the Circuit Court must be reversed and the causes remanded to the District Court for the Eastern District of Illinois, with direction to dismiss the bills of complainant for want of equity.

A true Copy.

Teste:

.....
Clerk of the United States Circuit
Court of Appeals for the
Seventh Circuit.

STIPULATION.

And now, November 1st, 1909, come the plaintiffs, Joseph F. Guffey, A. S. Guffey, E. N. Gillespie and Robert Pitcairn, Jr., co-partners trading as Guffey, Gillespie & Pitcairn, and make the following stipulation:

It appearing that the lease involved in this case, made by Susannah Smith to M. A. Walton, dated May 22, 1905, and by him assigned, and which lease is now vested in the plaintiffs, contains the following clause:

"And further, upon the payment of one dollar at any time by the party of the second part, heirs, successors or assigns, to the party of the first part, heirs, successors or assigns, shall have the right to surrender this lease for cancellation, after which all payments and liabilities thereafter to accrue under and by virtue of its terms, shall cease and determine, and this lease become absolutely null and void."

And it appearing from the evidence in this case that the reason for the insertion of said clause in the said lease was to enable the lessee and his assigns to protect themselves from the obligation to pay rental, in case the property covered by the lease should subsequently within the term of the lease prove to be valueless as oil-producing property, and it further appearing by the evidence that the property has proven to be oil-producing property, and the reason for the insertion of said surrender clause has ceased to exist, the plaintiffs do hereby waive and renounce any and all further or other benefit or advantage whatsoever for or by reason of the existence in said lease of the clause

above mentioned; and do hereby further stipulate and agree that they will not, in any manner, shape or form, exercise or take any benefit or advantage whatsoever of or from said clause.

(Signed) GUFFEY, GILLESPIE & PITCAIRN,
JOSEPH F. GUFFEY,
A. S. GUFFEY,
ROBERT PITCAIRN, JR.,
E. N. GILLESPIE.

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FILED.

DEC 30 1912

JAMES H. MCKENNEY

CLERK

IN THE
Supreme Court of the United States

Nos. ~~902~~,
~~903~~,

OCTOBER TERM, 1912.

JOSEPH F. GUFFEY, A. S. GUFFEY, E. N. GILLESPIE,
and ROBERT PITCAIRN, JR., co-partners trading
as GUFFEY, GILLESPIE & PITCAIRN,
Petitioners,

vs.

JAMES A. SMITH, J. W. SOLLEY, C. F. JOHNSON
WALTER HENNIG, and THE OHIO OIL COM-
PANY, a Corporation, Respondents,

and

JOSEPH F. GUFFEY, A. S. GUFFEY, E. N. GILLESPIE,
and ROBERT PITCAIRN, JR., co-partners trading
as GUFFEY, GILLESPIE & PITCAIRN,
Petitioners,

vs.

SUSANNAH SMITH, J. W. SOLLEY, C. F. JOHNSON,
WALTER HENNIG, and THE OHIO OIL COM-
PANY, a Corporation, Respondents.

BRIEF ON PETITION FOR CERTIORARI.

JOSEPH W. BAILEY,
LEVY MAYER,
J. W. MOSES,
J. H. BEAL,

Attorneys for Petitioners.



IN THE
Supreme Court of the United States

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WALTER HENNIG, and THE OHIO OIL COM-
PANY, a Corporation, Respondents,

and

JOSEPH F. GUFFEY, A. S. GUFFEY, E. N. GILLESPIE,
and ROBERT PITCAIRN, JR., co-partners trading
as GUFFEY, GILLESPIE & PITCAIRN,
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vs.

SUSANNAH SMITH, J. W. SOLLEY, C. F. JOHNSON,
WALTER HENNIG, and THE OHIO OIL COM-
PANY, a Corporation, Respondents.

Brief on Petition for Certiorari.

(1) Petitioners' leases are in the usual form of oil and gas leases, and were duly executed and delivered on May 22, 1905; on November 13, 1905, they were assigned to Prosser, and on December 26, 1905, by him assigned to Gillespie, one of the Petitioners; and the leases and these assignments all properly acknowledged, were duly recorded on June 15, 1906.

(2) The Respondents claim under a lease made by our lessors to Allison, dated August 9, 1906, but acknowledged and delivered August 31, 1906, assigned to Willet September 1, 1906; the assignment and lease recorded January 28, 1907, and the assignment to the Respondents, Solley, Johnson and Hennig, made on March 25, 1907, and recorded April 1, 1907.

Priority, therefore, rests clearly with the Petitioners.

Willoughby vs. Lawrence, 116 Ill., 11.

(3) The Petitioners' leases, notwithstanding the presence of the so-called surrender clause, are valid and binding leases (*Poe vs. Ulrey*, 233 Ill., 56) and they vest in the Petitioners a *freehold* estate (*People vs. Bell* 237 Ill., 332).

(4) The Petitioners have not been in default in the performance of any of the covenants of their leases. The Master in his seventh finding of fact, says:

"The Master further finds that the complainants have been at all times financially responsible and able to perform the covenants of their lease; that they have not drilled a well on said premises, but that they have paid all the rentals required by the terms of said lease to be paid, at the rate of twenty-five cents per acre, and deposited the same in the bank designated in the lease to receive the same, for the owner of the land."

The Petitioners fully observed the covenants contained in the leases, and no extrinsic facts were shown raising any implied covenant or any further obligation upon the part of the Petitioners. When the leases were taken, these properties were in wild-cat territory—the

nearest operation being fifteen miles away, and at the time the Respondents entered and drilled, there were no operations on adjoining properties which threatened to drain the oil from these properties.

(5) Not only did the second lessees take with notice, but they induced our lessors to violate the lease held by us and to make the second lease, as shown by that lease, by agreeing to pay the lessors an increased royalty; and the present real Respondents, Solley, Johnson and Hennig, at the time of taking the assignment of these leases, were substantially indemnified against loss by the guarantee made by their assignor "to protect and defend title under" said leases. (Record 19.)

(6) Our petition for *certiorari* (pages 5-7) sets forth the reasons why the surrender clause contained in these leases is a fair and proper provision; and the Master and the Court below have found not only that such clause is usual and customary in oil and gas leases, but also that it does not render the leases inequitable.

THE REAL ISSUE.

The point involved in this Application is one of nation-wide importance. It affects not only the leases of private persons, but the same surrender provision is contained in the oil leases issued by the Interior Department when leasing Indian lands for oil and gas purposes. Confusion and uncertainty, and conflict of decisions, envelope the question to an unusual degree. The enforceability, not to say validity, of very many thousands of iron, coal, gas, and oil leases hang in the balance. All of that class of leases have, for many years, contained the provision which the Circuit Court

of Appeals of the Seventh Circuit has in this case held fatal to their enforcement by injunction.

The opinion of the Circuit Court of Appeals was rendered by Judge Mack, and concurred in by Circuit Judge Kohlsaat and District Judge Sanborn. The opinion on its face, we think, indicates clearly that the court did not, to quote from its language, consider itself "free to consider the question on its merits." If, in the interpretation of an opinion, counsel may be permitted to read between the lines, we would be tempted to say that the Circuit Court of Appeals would have arrived at a different conclusion had it not felt itself "concluded by the decision of this" (that) "court in *Federal Oil Co. vs. Western Oil Co.*, 121 Fed., 674."

Further on in this discussion, we refer to the Federal Oil Company case, and we think successfully distinguish it from the one at bar. But two judges (Jenkins and Grosscup) sat in the Federal Oil Co. case. Not only can that decision be differentiated from the one at bar, but the Federal Oil Co. case involved an Indiana lease, and followed, as a rule of property, the decisions of that state, which hold that "the legal effect of the instrument here in question" (oil and gas lease) "is therefore the grant of a mere use, for the purpose of prospecting. The title is inchoate, and for the purposes of exploration only, until the oil or gas is found; if not found, *no estate vests in the lessee*," etc.

The Indiana cases, some of which are referred to in the Federal Oil Co. case, uniformly hold that a lease of the kind under discussion, does not constitute an encumbrance on or a conveyance or transfer of any interest in land, but gives merely a right of prospecting and exploring, and that the lessor parts with "no imme-

diate title or estate." The most recent enunciation of this doctrine in Indiana will be found in *Kokomo Natural Gas & Oil Co. vs. Matlock* (decided March 6, 1912), 97 N. E. Rep., 787; also reported in 39 L. R. A. (N. S.), 675.

In Illinois such a lease transfers a freehold interest in the premises, and, in order to be valid, must "contain a release or waiver of the homestead rights," etc. (*Bruner vs. Hicks*, 230 Ill., 536; *Poe vs. Ulrey*, 233 Ill., 56, 62; *Gillespie vs. Fulton Oil & Gas Co.*, 236 Ill., 188, 201; *People vs. Bell*, 237 Ill., 332).

The Circuit Court of Appeals in the present case, therefore, in relying upon the Federal Oil Co. case, was following one which arose in a state where a different rule of property applies from that which prevails in Illinois.

But in the present case, the Circuit Court of Appeals also held (and properly) that it was not bound by the decisions of the Supreme Court of Illinois on the question of whether an equitable remedy would or would not be applied.

The rule is, of course, well established that Federal Courts, in the exercise of their jurisdiction in equity, and in determining questions which depend upon the general principles of equity jurisprudence, are not bound to follow the decisions of the courts of the state wherein they sit or where the controversy arose. (*Russell vs. Southard*, 12 How., 139; *Kuhn vs. Fairmount Coal Co.*, 215 U. S., 349; *Black's Law of Judicial Precedents*; or the *Science of Case Law* (1912), Sec. 198, pp. 655-656).

We are not unmindful of the rule of *stare decisis*. Even if the Federal Oil Co. case were not distinguishable, still, standing as a precedent, it is but a single and isolated decision in the Seventh Circuit; and we submit that that court ought, therefore, to have been more disposed to overrule it than if it had been a decision which had been often approved and followed. (*Black's Law of Judicial Precedents*, p. 206.) And this court has ruled that "the rule of *stare decisis*, though one tending to consistency and uniformity of decision, is not inflexible. Whether it shall be followed or departed from, is a question entirely within the discretion of the court which is again called upon to consider a question once decided." *Hertz vs. Woodman*, 218 U. S., 205.

In the language of *McDow vs. Hoyer*, 21 Pa. St., 412, 423:

"Of course, I am not saying that we must consecrate the mere blunders of those that went before us, and stumble every time we come to the place where they have stumbled."

When the court in the Federal Oil Co. case said (p. 677) that "Equity will not specifically enforce a contract against one party, when it cannot be specifically enforced against the other," it referred to *Marble Co. vs. Ripley*, 10 Wall. 339, 359.

Professor Ames, in his article on "*Mutuality in Specific Performance*," in Vol. 3, No. 1 (Jan., 1903), of the *Columbia Law Review* (pp. 1 to 12), speaks of the ruling on this point in *Marble Co. vs. Ripley* (at page 11) as having been merely "*dicta*;" and, as showing that the rule in this court is not that sometimes at-

tributed to *Marble Co. vs. Ripley*, refers to *Franklin Telegraph Co. vs. Harrison*, 145 U. S., 459.

So also Mr. Pomeroy, the author of the article on Specific Performance, in Vol. 36 of Cyc., beginning at page 528, in referring to *Marble Co. vs. Ripley*, says:

“The rule (here under discussion) originated in some remarks in the course of the opinion in *Rutland Marble Co. vs. Ripley*, 10 Wall. 339, in which case, however, there were several other defenses of undoubted validity.”

and then the author compares *Rutland Marble Co. vs. Ripley* with *Franklin Telegraph Co. vs. Harrison*, 145 U. S., 459, “which seems on its facts to be inconsistent with the rule.”

The same author (Professor Pomeroy) in speaking of contracts terminable by plaintiff at any time, says (at page 631):

“A rule unknown to English equity has in late years obtained a foothold in several jurisdictions, that a continuing contract will not be enforced specifically if it is one which, by its terms plaintiff is permitted to terminate at will. A reason for the rule is supposed to be found in the well established doctrine that a contract terminable at will by *defendant*” (italics are our own) “will not be the subject of a decree, since it is to be presumed that the decree will at once be nullified by defendant.”

In commenting upon that doctrine, in an interesting note, the same author says (p. 632):

“The rule originated in some remarks in the course of the opinion in *Rutland Marble Co. vs. Ripley*, 10 Wall., 339, in which case, however, there

were several other defences of undoubted validity. In *Rusk vs. Conrad*, 47 Mich., 449, it was the ground of the decision; a natural decision, since the court had recently refused specific performance of an ordinary option. Later cases, relying on these, seem to accept the rule as well established by unquestionable authority. None of the opinions give evidence of having weighed the very serious objections to the policy of the rule. There is no real analogy between the position of a defendant resisting specific performance, who may at will nullify a decree, and that of a plaintiff who has given the most practical possible demonstration of his desire to carry out the contract by engaging in a law-suit for the purpose. To call the decree in the latter case 'an idle formality' (*Federal Oil Co. vs. Western Oil Co.*, 112 Fed., 373; affirmed in 121 Fed., 674), is to outrage common sense. To decline relief in these cases, on a ground so technical is to outlaw a large species of most important contracts in which it is necessary for one party's protection that the duration of the contract should be more or less indefinite. *Rusk vs. Conrad*, *supra*, for instance, dealt such a blow to the development of the mineral resources of Michigan, that it was quickly overruled by statute. * * * Several of the cases cited, where plaintiff, in reliance on the contract, had incurred large expenditures, can only be described as flagrant miscarriages of justice. See *Fowler Utilities Co. vs. Gray*, 168 Ind., 1, ignoring the previous decision of the same court in *St. Joseph Hydraulic Co. vs. Globe Tissue-Paper Co.*, 156 Ind., 655."

A recent illustration of the rule which fits in with the development of the doctrine, and the logic of the

law, is *Jones vs. Earl of Tankerville*, Law Reports, Chancery Division, 1909, Vol. 2, p. 440. There plaintiffs entered into a contract with the defendant for the purchase of certain timber growing on the defendant's property. The plaintiffs began cutting and removing timber, and the defendant thereafter repudiated his contract, and forcibly ousted the plaintiffs. Plaintiffs thereupon asked for an injunction, to restrain the defendant from preventing plaintiffs from cutting the timber. It was contended that because the defendant could not have compelled the plaintiffs to cut the timber, but would have had merely his remedy at law for damages, therefore the plaintiff could not, by injunction, prevent the defendant from interfering with the plaintiffs in the cutting of the timber. It was argued that "in contracts of this sort, there is a want of mutuality, which precludes the remedy by way of specific performance." The court replied,—

"* * * A court of equity, in granting an injunction, would only be restraining the violation of a legal right. An injunction restraining the revocation of the license" (to enter and cut timber) "when it is revocable at law, may, in a sense, be called relief by way of specific performance; but it is not specific performance in the sense of compelling the vendor to do anything. It merely prevents him from breaking his contract. * * *."

The doctrine that a contract, to be enforced by injunction, must be one that can be mutually specifically enforced, is a fallacious statement of the rule, and is at variance with an accurate understanding of fundamental principles and of the doctrine and its development. It is a misapprehension of the law to say that a contract can not be enforced by injunction at the suit of the plaintiff because the other party, if plaintiff, could

not obtain such a remedy. The law does not require that there shall be mutuality of the same remedy, but merely that there shall be mutuality of obligations, and that the contract shall be enforceable at the suit of both parties thereto,—not that the remedy of each party shall be the same.

The doctrine is juridically analyzed, and the true rule announced, in Professor Ames' article, in 3 Columbia Law Review, p. 1.

Professor Langdell, in speaking of this much misunderstood rule, said, in 1 Harvard Law Review, at p. 104:

"The rule as to mutuality of remedy is obscure in principle and in extent, artificial, and difficult to understand and to remember."

The true rule is stated thus, in *Northern Central Ry. Co. vs. Walworth*, 193 Pa. St., 207:

"The principle that contracts must be mutual,—must bind both parties or neither,—does not mean that in every case each party must have the same remedy for a breach by the other, but that the contract is enforceable on both sides in some manner; not necessarily enforceable on both sides by specific performance."

Like doctrine was laid down in the later Pennsylvania case of *Philadelphia Ball Club vs. Lajoie*, 202 Pa. St., 210; in that case the plaintiff had the option to terminate the contract. The court said:

"If the doctrine laid down in *Rusk vs. Conrad*, 47 Mich., 449," (subsequently changed by statute—see *Grummett vs. Gingrass*, 77 Mich., 369), "quoted

in the opinion, is to prevail, it would seem that the power of the plaintiff to terminate the contract upon short notice, destroys the mutuality of the remedy; but we are not satisfied with the reasoning intended to support that conclusion. We can not agree that mutuality of remedy requires that each party should have precisely the same remedy, either in form, effect, or extent."

In *Eckstein vs. Downing*, 64 N. H., 248, the court quotes from *Pomeroy on Specific Performance*, Sec. 159, Note 1, thus:

"Indeed, the rule, so far as it relates to the mutuality of the remedy alone, is evidently based upon no principles of abstract right and justice, but, at most, upon notions of expediency."

Then the court adds:

"A technical rule is, or should be, subject to the general inquiry whether a party requires other and better relief than a suit at law can give."

And at page 260:

"The mutuality required is that which is necessary for creating a contract enforceable on both sides in some manner (citing authority) but not necessarily enforceable on both sides by specific performance."

In *Montgomery Light & Power Co. vs. Montgomery Traction Co.*, (decided October 16, 1911), 191 Fed., 657, there was a contract on the part of a street railroad company to take all of the electrical power required in its business, for a term of years, from an electric power company. The contract gave the street railroad company the right, under certain circumstances, at its elec-

tion, to terminate the contract. The court (Jones, District Judge), in a long review of the authorities, approvingly cites the language above quoted from *Northern Central R. R. Co. vs. Walworth*, 193 Pa., 207, and adds:

“Though clearly lack of mutuality may exist in the terms of the agreement, inasmuch as some of the terms are unenforceable in equity, yet if the final test shows that the remedy of a conditional decree does not leave the defendant to a legal remedy, as plaintiff must give performance as long as he receives it. * * * The doctrine thus laid down has received the approval of the Supreme Court in three late cases, specifically enforcing contracts similar in character to that involved here.” (Citing *Franklin Telegraph Co. vs. Harrison*, 145 U. S., 459; *Joy vs. St. Louis Ry. Co.*, 138 U. S., 1; *Union Pacific Ry. Co. vs. Chicago Ry. Co.*, 163 U. S., 564, 601.)

Diversity of decisions in the state courts.

In *Pyle vs. Henderson*, 65 W. Va., 39, the Supreme Court held that the presence of a surrender clause in a lease did not bar a right to equitable relief. In that case the bill was filed by the second lessee against the first lessee. The first lessee, whose lease contained a surrender clause, had failed to drill a well or pay rental within the period provided. The Court, however, found that his default in paying the rental was excusable, held that the lessor had no right to make the second lease, dismissed the second lessee's bill filed to have the first lease declared a cloud upon the title, and upon the defendant's cross-bill granted an injunction against the second lessee and compelled him to account for the oil taken from the land.

In *Busch-Everett Co. vs. Vivian Oil Co.* (128 La., 886), decided by the Supreme Court of Louisiana, the defendant had obtained from a former owner an oil and gas lease containing a provision that if a well were not completed within three months the grant was to become null and void but that the lessee might prevent such forfeiture by paying from month to month a certain sum until a well was completed; with a further provision reserving to the lessee the right to put an end to the contract by paying one dollar. No well having been completed, the vendee of the land refused to receive the monthly rental when tendered. The Court held that the provisions we have referred to did not render the contract lacking in mutuality and that the lessee was entitled to be protected in its property rights.

In *Central Ohio Natural Gas & Fuel Company vs. Eckert*, 70 Ohio State, 127, the lease provided that the second party should drill a well within six months or thereafter pay lessor \$160 annually "until said well is drilled or the property hereby granted is reconveyed to the first party." No well was drilled but the rental was paid for several years when the lessor refused to accept further rentals and made a second lease for the property. The lessor and the second lessee then filed a bill against the first lessee for an injunction and decree quieting plaintiffs' title, and the Court below entered a decree in their favor. This was reversed by the Supreme Court, and the case remanded for further proceedings.

In Illinois, however, the situation is somewhat peculiar. In *Poe vs. Ulrey*, 233 Ill., 56, a bill was filed by the lessor to have the lease declared void because of the presence of the surrender clause. This relief the

Court refused, holding that the presence of this clause did not render the lease invalid or create a tenancy at will, terminable at the option of either party. But in *Ulrey vs. Keith*, 237 Ill., 284, on a bill filed by the lessee against the lessor to restrain the lessor from interfering with the lessee in operating for oil and gas under a similar lease, the Court refused the relief upon the ground of the presence of the surrender clause, holding that the granting of such a remedy was governed by the same rules as a bill for specific performance, and holding that the presence of the surrender clause destroyed the mutuality required for a decree of specific performance.

This decision has been very strongly criticized by Professor Henry Schofield in 3 Illinois Law Review, 43, 601, 608, and is there shown to be at variance with the reason and history of the law and with the weight of authority.

The Supreme Court of Oklahoma, in *Kolochny vs. Galbraith*, 26 Oklahoma, 772, has adopted the doctrine of the Illinois courts.

The Cases in the Federal Courts.

Putting aside for the moment the decision of the Circuit Court of Appeals in the present case and the decision in the *Federal Oil Case*, the question of the enforcement of such leases has been several times before the Federal courts.

In *Allegheny Oil Company vs. Snyder*, 106 Federal, 764, the Circuit Court of the United States for the Southern District of Ohio, granted an injunction at the

suit of the first lessee, who had never entered, as against the second lessee, who had entered and drilled, and on appeal this was affirmed by the Circuit Court of Appeals in an opinion by Mr. Justice Day (then Circuit Judge). The report shows that this lease contained the usual surrender clause but no question seems to have been raised in the case that this barred the Court from granting the relief which it did give in that case.

Again, in *Logan Natural Gas Company vs. Great Southern Company*, 126 Federal, 623, in the Sixth Circuit, the bill was filed by a lessee who had never entered against a lessee who had entered and drilled. While the report does not show it, the record in the Court below discloses the fact, that these leases contained the usual surrender clause. In this case the injunction was granted.

Mr. Justice Lurton (then Circuit Judge) sat in the Circuit Court of Appeals on the hearing of both the foregoing cases.

Mr. Justice Van Devanter considered the effect of a surrender clause in *Brewster vs. Lanyon Zinc Company*, 140 Federal, 801, while sitting as Circuit Judge in the Circuit Court of Appeals for the Eighth Circuit. That was a bill in equity to establish as a matter of record the forfeiture of an oil and gas lease. One of the grounds upon which this was sought was the presence of a provision authorizing the lessee at any time to remove his property and reconvey the premises granted, whereupon the lease should be null and void. It was claimed that this provision rendered the lease wanting

in mutuality, and of this contention Mr. Justice Van Devanter, in delivering the opinion of the Court, said:

"The option reserved to the lessee was not designed to convert the estate, as otherwise defined, into a mere tenancy at will, or to make it determinable at any time at the option of the lessor. The lease expresses the intention of the parties, and, no rule of law forbidding, that intention is controlling. The consideration of \$1, the receipt of which was acknowledged, although small, was yet sufficient to make the lease effective and to support every stipulation in it favorable to the lessee, including the option to surrender it at any time. *Brown vs. Fowler*, 65 Ohio St., 507, 525, 63 N. E., 76; *Gas Co. vs. Eckert*, 70 Ohio St., 127, 135, 71 N. E., 281; *Davis vs. Wells*, 104 U. S., 159, 168, 26 L. Ed., 686; *Allegheny Oil Co. vs. Snyder*, 45 C. C. A., 604, 608, 106 Fed., 764, 767. *Resting, therefore, upon an executed and valuable consideration, the lease was not wanting in mutuality merely because it reserved to one party an option which it withheld from the other. Brown vs. Fowler and Gas Co. vs. Eckert, supra*, 9 Cyc., 334."

Coming now to the *Federal Oil Company* case, we respectfully submit that the Court below was in error in holding that it was concluded by that decision from considering the present case on its merits.

In the *Federal Oil Company* case, 121 Fed., 674, the lease contained this provision:

"In case no well is commenced within *one* day from this date, then this grant shall become null and void *unless* second party shall thereafter pay at the rate of eight and seventy-five hundredths

dollars (\$8.75) for each month such commencement is delayed in advance * * * . *Second well* shall be completed *ninety days* after first well and a well each ninety days thereafter until *seven* wells are in, then rental to cease.

The second party * * * may cancel and annul this contract *or any part thereof* at any time."

The lessee having failed for nine months to drill *any* wells, the lessor refused to receive any further rentals and made a second lease, whereupon the first lessee filed a bill for an injunction. The Court below sustained a demurrer and this was affirmed by the Circuit Court of Appeals in an opinion by Circuit Judge Jenkins; and the ground upon which the decision is rested can best be shown by the following language from his opinion:

"With respect to the agreement in question, there are two considerations which go far to impeach its fairness:

First, its want of mutuality. No obligation is assumed by the appellant to do anything—*either to drill or to pay*. It is in fact a mere option. It is undoubtedly true, as urged by the appellant, with respect to enterprises of this character, that a company proposing to obtain natural gas or oil in large quantities for sale or manufacturing purposes finds it desirable to acquire exclusive right to search for the fugitive mineral in a large area or areas; and, though it be not necessary for the proper development of the particular area to drill a well upon the land of all the several proprietors within the district, it is desirable and profitable to have no competing wells on the territory near to wells deemed sufficient for the development of the

territory. *That, however, was not the purpose of this contract.* It contemplated *immediate* exploration upon the particular land. A well was to be commenced within one day from its date, and postponement of operation was to be compensated for at the rate of \$8.75 for each month that such commencement was delayed * * * . The appellant had the right at any time to remove its property and cease operations without respect to the interests of Bradford, and with respect only to its own interest; and it could cancel and annul the contract, or any part thereof, at any time. There was here an entire want of mutuality—an utter absence of obligation on the part of the appellant."

In contrast with this, in the case at bar we have a lease (1) based upon a valuable consideration, (2) for a fixed term of five years, and longer if oil or gas be found within five years; (3) an express covenant to pay rental, upon which an action at law could be maintained; (4) a right in the lessee upon payment of one dollar to surrender the lease and relieve himself from thereafter paying rentals, and (5) the terms of the lease fair and equitable in all its provisions as found by the Master and the Court below.

The Court will observe then in the *Federal Oil case* (1) there was no *covenant* to pay rental—the provision being only that the lease should become null and void *unless* payment was made. (2) No definite term. If rentals were paid operations could be deferred forever. (3) The Court held that the parties *contemplated immediate* operations; but there was no express covenant to drill a well at any time.

In case no well was commenced within one day, then the lease was to become null and void *unless* the lessee paid \$8.75 per month. Then there was a provision that the second well should be completed within ninety days after the first well, and a well each ninety days thereafter until seven wells were completed. But, as pointed out by Judge Baker in the Court below (112 Federal, at page 376), the lessor was without remedy because he could not compel the drilling of the first well. And taking all the provisions of the lease and the conduct under it, Judge Jenkins said of it:

“Certainly the contract is most *unfair* and it would be *unconscionable* for a court of equity to place the appellant (the lessee) in a position to forever deprive the owner of the soil of the right to use his land or to drill for such treasures as the earth may contain.”

The Court below disregarded all of these differences excepting two, namely: (1) the fixed term of five years and (2) the express covenant to pay rental for delay.

As to the five year term: The Court below held this did not differ essentially from the indefinite term in the Federal Oil lease because the indefinite term did not render that lease void but only substituted a reasonable time instead of a fixed period for explorations. This, we submit, overlooked the fact that when the lease fixed five years, the parties had agreed upon what should be the period allowed for explorations, and this they did upon a consideration agreed upon between them. The difference, then, is this:

Where no period is fixed and the delay in beginning operations is unreasonable—as the Court held it

was in the Federal case—the lessee may forfeit the lease and release to other parties; but where the lease fixes a term, no such right exists because the lessee has paid for the right to the whole of the specified period.

As to the covenant to pay rental: The Court below admits that our lease contains an express covenant to pay rental; but it says that under the surrender clause the lessee may at any time surrender and thereby destroy this covenant; and then the Court says that while in order to do this, the lessee must pay one dollar and make an actual surrender, still this is only a nominal obligation which will not induce a court of equity to act. The result, therefore, is that the Court below first uses the surrender clause to destroy our express covenant to pay rental, and then it makes the fact of the right to surrender upon payment of what it calls a nominal obligation, destroy our right to an equitable remedy. From this it would appear as though perhaps the Court in the last analysis, had refused us relief because of a lack of a substantial consideration. But that this was not what the Court had in mind is clear from the second paragraph of the opinion where it says that the exact question has been decided by the Supreme Court of Illinois in *Ulrey vs. Keith*, 237 Ill., 284, and turning to that case we find that no question of consideration was involved, the decision being put expressly upon the ground of a lack of mutuality which the Court considered requisite for a decree of specific performance because the lease contained a surrender clause.

There is, we submit, some confusion of thought in the reasoning of the court below. The Petitioners' lease

was made for a valuable consideration, and, as said by Mr. Justice Van Devanter in the Brewster case,

“although small, was yet sufficient to make the lease effective and to support every stipulation in it favorable to the lessee including the option to surrender.”

Here the lease has provided what shall be the result of failure to drill within nine months, namely, the lessee must, and he covenants to, pay a fixed rental. The surrender clause is independent of this covenant to pay rental, and if the lessee desires to avail himself of it, he must pay one dollar and make an actual surrender; but when made, such surrender terminates the covenant only as to future rentals. It is not the consideration upon which the lessee might terminate the lease which is important in determining whether equity will grant relief; but the consideration pertaining to the entire contract. That consideration was one dollar, the covenants contained in the lease, the payment of rental at the rate of 25 cents per acre per annum, payable quarterly in advance, which payments the Master has found were in fact made, and if the lease is to be surrendered, one dollar must be paid and an actual surrender made; and this would include the execution and delivery of a re-conveyance, or other proper written instrument evidencing such surrender, duly acknowledged so that it might be recorded.

Even if the Petitioners had been seeking in equity to enforce the rights given them by the surrender clause, the Court would have looked not alone at the separate consideration provided for by that particular covenant, but at all of the provisions of the contract, and so regarding it, certainly would have held the consideration substantial.

So that (1) the surrender clause cannot properly be said to be based upon a merely "nominal obligation," and (2) the fact of the right to surrender did not destroy the express covenant to pay rental contained in the lease.

Because of these suggestions we submit that this case is entirely different from, and is not within the reasoning upon which, the Federal Oil case was decided.

The decision of the court below is in conflict with the decisions of this court and of the courts in other circuits, regarding the right to equitable relief.

The rule in the Federal Courts is clearly and concisely stated by Judge Lowell in the *Buttonhole case* (Vol. 22, Fed. Cases, No. 12,904) thus:

"It was formerly thought that an injunction would not be granted to restrain the breach of any contract, unless the contract were of such a character that the court could fully enforce the performance of it on both sides. Upon this ground there were many decisions refusing to interfere with contracts for personal services, however flagrant might be the breach of them. * * * But all these cases were overruled by one of the ablest chancellors who has adorned the woolsack, in *Lumley vs. Wagner*, 1 De Gex, M. & G., 616. * * * It is now firmly established that the court will often interfere by injunction when it cannot decree performance."

After carefully examining the cases, Judge Lowell sums up the doctrine upon this point as follows:

"I think the fair result of the later cases may be thus expressed: If the case is one in which the

negative remedy of injunction will do substantial justice between the parties, by obliging the defendant either to carry out his contract or lose all benefit of the breach, and the remedy at law is inadequate, and there is no reason of policy against it, the court will interfere to restrain conduct which is contrary to the contract, although it may be unable to enforce a specific performance of it."

In that case defendant made a contract with the plaintiff whereby the latter was constituted the sole and exclusive agent for the sale of button hole machines made by the defendant under patents owned by it. The defendant refused to deliver any more machines to plaintiff and was taking measures to avoid carrying out the contract. On bill filed the court granted an injunction. The contract in that case also contained a provision whereby the complainants were entitled to terminate the contract at any time, and it was claimed that a decree should be refused because of lack of mutuality. Upon this branch of the case Judge Lowell said:

"Supposing the stipulation to mean, what the defendants contend it does, that the complainant may renounce at any time, which may be doubted, still, if the defendants, for valuable considerations, have given the complainant an exclusive license until it forfeits it, I do not see why a court of equity should not protect that license by its injunction, as usual, so long as it is not forfeited. A very strong case was cited from (*Marble Co. vs. Ripley*) 10 Wall. (77 U. S., 339), in which the Supreme Court refused to decree the specific performance of a contract for quarrying marble, etc., on the ground, among several others, that the plaintiff had the right to give up the arrangement on a year's notice.

I cannot think that the Court intended to announce any general proposition that they would never enforce a contract which one party had a right to put an end to in a year. Everything must depend upon the nature and circumstances of the business. In many of the cases that I have cited, the plaintiff had it in his power to end the contract. It is certainly competent to the parties to make a contract which will be equitable and reasonable, and in which their rights ought to be protected while they last, though it may be terminable by various circumstances, and though one party may have the sole right to terminate it, provided their stipulation is not one that makes the whole contract inequitable.

The remedy by injunction is a very elastic and adaptable one, and there is no sort of difficulty in granting it, until, by a change of circumstances, it shall appear that it ought to be dissolved. A bill may be retained for that purpose for any number of years that may be requisite."

In *Western Union Telegraph Company vs. Union Pacific Railway Co.*, 3 Federal Rep., 423, a bill was filed by the Telegraph Company against the Railroad Company to protect itself in the operation of certain telegraph lines which had been erected under contract between the parties. The Court—while holding the contract, by reason of its character, to be one under which specific performance could not be decreed—granted an injunction, and in the opinion Circuit Judge McCrary says:

"It is insisted by counsel for defendants that the contract set out in the bill (assuming its validity) is one which requires the performance of con-

tinuous duties, involving the exercise of skill, personal labor, and cultivated judgment; and that, therefore, a court of equity will neither decree its specific performance, nor enjoin its violation. That the contract is in its nature incapable of being enforced by a decree for specific performance is very clear (*Marble Co. vs. Riply*, 10 Wall., 339); but it does not follow that a party to such a contract can have no injunction to restrain its breach. It is now settled, I think, by the decided weight of authority, that in such cases, although the affirmative specific performance of the contract is beyond the power of the court, its performance will be negatively enforced by enjoining its breach. *Pomeroy on Specific Performance*, Secs. 24, 25, 310, 311 and 312 and cases cited."

To the same effect are:

Goddard vs. Wilde et al., 17 Fed., 845;

Chicago, etc., Ry. Co. vs. New York, L. E. & W. R. Co., 24 Fed., 516;

General Elec. Co. vs. Westinghouse Elec. Co.,
151 Fed., 664.

In this court the same doctrine is recognized and applied in *Joy vs. St. Louis*, 138 U. S., 1, where an injunction was granted requiring one railroad company to permit another to use certain tracks in pursuance of a contract, although the right of the second company to continue such use was optional on its part.

In *Franklin Telegraph Company vs. Harrison*, 145 U. S., 459, the Telegraph Company made a contract with the plaintiff regarding the construction of a special wire, with the provision that after ten years the wire

should belong to the Telegraph Company, but the plaintiff should have the right to use the same by paying \$600.00 annually. The Court held that under this contract, after ten years, the plaintiff was entitled to purchase the use of the wire from year to year by making annual payments. While the plaintiff could have terminated the contract at the end of any year, and the defendant could not, from the very nature of the contract, have compelled plaintiff to perform it, the Court held that it could and would grant an injunction restraining the Telegraph Company from preventing plaintiff from using that wire.

That there is great confusion in the cases dealing with mutuality as required in cases of specific performance and the granting of injunctions to enforce contractual obligations cannot be denied. That it would be well if the cases could be brought into harmony, goes without saying; but our present concern is that this court shall remedy, so far as practicable, the conflict now existing in the law as regards the enforcement of oil and gas leases containing surrender clauses, and shall lay down for the guidance of all courts, federal as well as state, a rule applicable to such cases.

A good deal of the confusion existing in oil and gas cases has come about (1) by the failure to observe the essential distinction between the principles applicable in certain classes of cases of specific performance and the principles applicable in cases of injunctions to restrain or compel the performance of some contractual act or duty; (2) failure to observe the essential difference between cases where an injunction has been refused because of the existence in the *defendant* of a power of revocation absolute in its character whereby he could immediately

defeat the decree, and those cases where the power of revocation was in the *plaintiff*; and (3) the attempt to apply to cases broad, general statements of doctrine found in the text writers, without having due regard to the facts of the particular case.

A very concise discussion showing the lack of accuracy in the general statements of the text writers is found in an article by Professor Ames in 3 Columbia Law Review, 1, where after quoting the general doctrine of mutuality as stated by Fry, Professor Ames points out *eight* classes of cases in which relief is granted by injunction to one party to a contract and not to the other and which classes must be excepted out of the alleged general rule as stated by Fry.

Then, too, as to the power of revocation in the defendant, there are some cases such as *Southern Express Co. vs. Railroad Co.*, 99 U. S., 191, in this court where an injunction has been refused on that ground; while there is the other class like *Franklin Telegraph Co. vs. Harrison*, 145 U. S., 459, where an injunction has been granted to a plaintiff who had the right to terminate the contract. But certainly there is a marked difference as respects specific performance where power of revocation is in the party *seeking* specific performance and where it is in the party *resisting*. In the latter case there is no reason why the court should make a decree which the defendant may at once annul. But where the power of revocation is in the plaintiff, it is not to be assumed that the party seeking performance will, as soon as the decree is made, assert his power of revocation and destroy the decree; and if he did, why should the defendant complain.

But perhaps the most misleading element has been the confounding of suits for an injunction to restrain specific acts with suits for specific performance. The distinction between the cases is concisely stated by the Vice Chancellor in *Great Northern Ry. Co. vs. Manchester etc. Ry. Co.*, 5 DeG. & S., 138, where two railway companies entered into an agreement in writing that each of the companies should interchangeably use the railway of the other on certain terms, and the bill was filed by one company to restrain the other from preventing the plaintiffs from running engines and cars over a portion of the defendant's road in accordance with the agreement. The Vice Chancellor, in granting the injunction, said:

"Then it was suggested, that this was an agreement which could not be specifically performed, and therefore that there could be no injunction granted. Now, it does not appear to me that this is a question of specific performance at all. The defendants assert that there is no agreement binding upon them; and they assert a right of acting as if there were no agreement. The question between the parties here is, not as to the mode of enjoying the agreement, supposing the agreement exists; but it is, whether the agreement is or is not valid, or does or does not exist at all. There was a case, *Dietrichsen vs. Cabburn* (a), which seems to be very much in point upon this question. Lord Cottenham said in that case, 'The jurisdiction of the Court to restrain by injunction an act, which the defendant is bound by contract to abstain from, is not confined to cases in which there are either no executory terms in the contract, or none which a Court of equity has not the means of enforcing.' It was asserted there, that, because this Court could not specifically per-

form the whole of the agreement between the parties in all its terms, therefore it would not interfere to restrain one of the parties from acting contrary to the agreement; and his Lordship said, that a question of this kind had nothing to do with the question of specific performance."

To like effect is the very recent case of *Jones vs. Earl of Tankerville*, Law Reports, Chan. Div. 1909, vol. 2, p. 440.

Now in the present case, it is manifest that the real parties to the contest are two rival lessees. The only relief sought against the lessor is an injunction restraining him from aiding and assisting the second lessees in keeping the Petitioners out of the possession of the property. There is nothing in this which savors of true specific performance. On the contrary it is at most a suit for an injunction to restrain the lessor from violating a specific covenant implied in the lease, viz., the covenant for quiet enjoyment just as would be a suit to prevent by injunction a lessee from violating a covenant against an assignment of the lease.

If, instead of filing their bill in equity, the Petitioners had forcibly dispossessed the Respondents and taken and held possession of the property, thereby compelling the Respondents to come into court, what would have been the result? As the Respondents' leases contain the same surrender clause as is contained in the Petitioners' leases, the Court under the ruling of the Circuit Court of Appeals would have been required to refuse equitable relief; while the present Petitioners, holding under leases adjudged valid and binding by the Supreme Court of Illinois, would have been rightfully in possession of their own property.

Now because they did not resort to force but sought in the courts of justice a remedy for the invasion of their legal rights, is it possible that they are by the decree of a Court of Equity to be placed in a worse plight than if they had resorted to force?

We submit that in cases of this kind the only question raised by the presence of the surrender clause is as to the *fairness* of the contract, and when the Court finds, as in the present case, that such a clause is usual in contracts of this character and that it is not unfair or inequitable, it is its duty to grant equitable relief.

Respectfully submitted,

JOSEPH W. BAILEY,
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16

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JAMES H. MCKENNEY,

In the Supreme Court of the United States

JOSEPH F. GUFFEY, ET AL.,
Petitioners,

vs.

JAMES A. SMITH, ET AL.,
Respondents.

No. ~~902~~ 408
IN CHANCERY.

JOSEPH F. GUFFEY, ET AL.,
Petitioners,

vs.

SUSANNAH SMITH, ET AL.,
Respondents.

No. ~~909~~ 410
IN CHANCERY.

Statement, Brief and Argument for Respondents, Solley, John-
son, Hennig, James A. Smith, and
Susannah Smith.

By JAY A. HINDMAN,
Solicitor for Respondents.



In the Supreme Court of the United States

JOSEPH F. GUFFEY, ET AL.,	} No. _____ IN CHANCERY.
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Statement, Brief and Argument for Respondents, Solley, John-
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Susannah Smith.

By JAY A. HINDMAN,
Solicitor for Respondents.

In the Supreme Court of the United States

Wm. H. Taft, Chief Justice,
and the Justices of the Supreme Court,
Respondents,
v.
The United States, Appellant.

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Statement of the Case.

Bills were filed in the Circuit Court of the United States for The Eastern District of Illinois, seeking to enjoin these respondents from operating upon certain lands for the production of petroleum oil and natural gas therefrom, and for an accounting for the oil and gas by them produced, and for other relief. From decrees granting the prayer of the respective bills, appeals were taken to the United States Circuit of Appeals for the Seventh Circuit, in which court the decrees of the lower court were reversed and the cases remanded to the court below with instructions to dismiss the bills for want of equity.

The facts disclosed by the record are the following:

On the 22nd day of May, 1905, respondent, James A. Smith, was the owner of a certain tract of land in Crawford County, Illinois, containing 20 acres. At the same time, his mother, Susannah Smith, respondent herein, was the owner of a tract of land containing 30 acres, lying adjacent thereto.

On the same day, these parties each executed to one M. A. Walton an instrument commonly called an oil and gas lease, on said respective tracts, purporting to be "for the sole and only purpose of mining and operating for oil or gas" on said lands. The tenancy, if any tenancy was created, was for a period of five years, "and as long thereafter as oil or gas, or either of them, is produced therefrom."

These instruments were identical in all respects save as to the description of the tracts of land upon which they were respectively given, and the names of the "first party." And since both cases have the same history and were tried together, in the economy of time and labor, we will so treat them here,

and all reference to either of these leases or to either land owner will be intended to apply to both, unless otherwise expressly designated.

The recited consideration for the execution of these instruments is \$1.00, "and the covenants and agreements hereinafter contained on the part of the party of the second part, to be paid, kept and performed." Said instruments, omitting only the name of the "first party" and the description of the lands, are in these words:

THE CONTRACT.

"AGREEMENT, Made and entered into the 22nd day of May, A. D., 1905, by and between _____ of Licking Township, Crawford County, and State of Illinois, party of the first part, and A. M. Walton, party of the second part,

WITNESSETH, That the said party of the first part, for and in consideration of the sum of one dollar, in hand well and truly paid by the party of the second part, the receipt of which is hereby acknowledged, and the covenants and agreements hereinafter contained on the part of the party of the second part to be paid, kept and performed, has granted, demised, leased and let unto the party of the second part, heirs, executors, administrators and assigns, for the sole and only purpose of mining and operating for oil and gas, and of laying pipe lines and building tanks, stations and structures thereon to take care of said products, all of that certain tract situate in Licking Township, Crawford County, and state of Illinois, bounded substantially as follows, _____ and being the same land conveyed to the said first party by _____, reserving, however, therefrom 200 feet around the buildings on which no well shall be drilled by either party except by mutual consent.

"It is agreed that this lease shall remain in force for the

term of five years from this date, and as long thereafter as oil or gas, or either of them, is produced therefrom by the party of the second part, their heirs or assigns.

"IN CONSIDERATION OF THE PREMISES, The said party of the second part covenants and agrees: 1st, To deliver to the credit of the party of the first part,——— heirs or assigns, free of cost, in the pipe line to which it may connect its wells, the equal $\frac{1}{8}$ part of all oil produced and saved from the leased premises; and, second, To pay \$100 per year for the gas from each and every gas well drilled on said premises, the product of which is marketed and used off the premises, said payment to be made on each well within sixty days after commencing to use gas therefrom as aforesaid, and to be paid yearly thereafter while the gas from said well is so used.

"Second party covenants to locate all wells so as to interfere as little as possible with the cultivated portions of the farm. And, further, to complete a well on said premises within nine months from the date hereof, or pay at the rate of 25 cents per year, quarterly in advance, for each additional three months such completion is delayed from the time above mentioned for the completion of such well, until a well is completed; and it is agreed that the completion of such well shall be and operate as a full liquidation of all rentals under this provision during the remainder of the term of this lease. Such payment shall be made direct to the lessor or deposited to his credit in Exchange Bank, Martinsville, Illinois.

"IT IS AGREED, That the second party is to have the privilege of using sufficient water from said premises to run all machinery necessary for drilling and operating thereon and at any time to remove all machinery and fixtures placed on said premises; and, further, upon the payment of one dollar, at any time, by the party of the second part, heirs or assigns, shall have the right to surrender this lease for cancellation, after which all payments and liabilities thereafter to accrue

under and by virtue of its terms, shall cease and determine, and this lease become absolutely null and void.

“WITNESS, The following signatures and seals:”—Tr. pp. 3-5-76.

Afterward, on the 13th day of November, 1905, Walton assigned both of said leases to one R. L. Prosser, who was acting for the petitioners, Guffey, Gillespie and Pitcairn, the consideration for the assignment of both of said leases being \$11.00, and on the 26th day of said year, said Prosser formally transferred said leases to said Gillespie for the use and benefit of the petitioners herein, and on the 15th day of June, 1906, said instruments were recorded in the office of the recorder of Crawford County, Illinois. Tr. pp. 6-7-79-84.

On March 23, 1906, no possession having been taken of the premises under said leases, and the time having expired for the completion of a well on the leased premises, and no money having been paid for a failure to complete a well within nine months, as required by the terms of the leases, said Smiths executed other leases on said premises to one H. E. Wilcox, who had similar leases on other lands in the vicinity, and who, in the month of April of that year began the construction of a well on land near the premises in controversy. Tr. pp. 232-346.

After the execution of the leases to Wilcox by the Smiths, and about the time he was engaged in drilling a well in the vicinity, a deposit was made in the Exchange Bank of Martinsville, Illinois, by E. N. Gillespie to be placed to the credit of the Smiths on account of the so-called rentals, or penalty for failure to complete a well within nine months, as required by the terms of the leases, which payment, by the terms of the leases, became due on the 22nd day of the preceding February, and at the time of the deposit was long past due, and of which

deposit the Smiths had no knowledge, and received no notice whatever. Tr. pp. 232-353-354.

Afterward, on the 9th day of August, 1906, no possession having been taken of the premises under said leases, and there being no indication of any intention to ever make any development under the Walton leases, and the Wilcox leases having been surrendered, said Smiths made inquiry in person and by letter at the bank where the rentals, under the Walton lease were made payable, and being informed that no deposit had been made for that purpose, they executed other leases on the premises to one C. E. Allison, who, on the 1st day of September, 1906, sold said leases to one Mr. Willett, of the firm of Little & Willett of Buffalo, N. Y.

Under these leases, Mr. Willett, or the firm of Little & Willett, took possession of the premises and constructed two wells thereon, and likewise constructed wells on adjoining premises on which they held similar leases, all of which wells proved to be productive of oil and gas and showed the premises to be valuable for oil and gas purposes. They likewise constructed upon the premises a power house and installed a power and other structures and equipments incident to the business and carried on the work of developing the premises until the spring of 1907, when these leases, thus improved, were sold to J. W. Solley, C. F. Johnson and Walter Hennig, respondents herein. Tr. pp. 380-381.

Preliminary to this purchase, Mr. Hennig caused an abstract of the title to the premises to be made which showed the title to be perfect and, without any knowledge upon his part, or the part of his associates, of the existence of the Walton leases, these leases, together with a lease on another small tract, aggregating 90 acres, were purchased from Little & Willett for the sum of \$50,000.00, of which \$30,000.00 was paid in cash and the remaining \$20,000.00 of the purchase price was secur-

ed by a mortgage on the premises, which indebtedness has since been paid and the mortgage satisfied. Tr. pp. 393-402.

Under this assignment of the Allison leases, Solley, Johnson and Hennig made valuable and lasting improvements upon the premises, and by the expenditure of \$31,404.64 by way of development, in addition to the purchase price, the property has been rendered exceedingly valuable for oil and gas purposes. Tr. pp. 394-400-469.

Subsequently, after there had been twelve producing wells constructed upon the premises, and after there had been placed thereon expensive, permanent equipment, consisting of a power and power house, tankage, machinery, pipe lines, and other equipment incident to the business, and after other development in the vicinity had demonstrated that the premises in controversy were in a rich oil pool and of great value, at the September term, 1908, the petitioners herein brought proceedings in the Circuit Court of Crawford County, Illinois, against these respondents, in relation to the same subject-matter and demanding the same relief as prayed for herein. While these proceedings were pending in said court, the Supreme Court of the state of Illinois rendered the decisions in the case of *Watford Oil and Gas Co. v. Shipman*, 233 Ill., 9, and *Ulry vs. Keith*, 237 Ill., 284, in both of which cases it was held that leases of kind here in controversy are not enforceable in a court of equity. Whereupon, the complainants dismissed their cases in the state court and filed them in the Circuit Court of the United States for the Eastern District of Illinois. Tr. pp. 500.

Cases Referred,—Decrees Rendered.

In due course, these cases were referred to a master in chancery of said court who, after taking much testimony, made and filed in said court his report, containing his finding of facts and his conclusions of law thereon, and recommending a decree cancelling the leases held by these respondents, enjoining

them from further operation upon the premises, requiring them to account to the complainants for all money received from the sale of oil and gas, denying them any credit for the cost of developing and improving the premises and charging them interest on the money received by them from the sale of oil and gas produced from the premises most of which had been invested in the very improvements which were turned over to the complainants.

To the report of the master and his conclusions of law, these respondents filed elaborate exceptions which were overruled by the court and decrees were rendered in accordance with the recommendation of the master. Tr. pp. 533-565.

Cases Appealed,—Reversed.

From the decrees, so rendered, these respondents appealed to the Circuit Court of Appeals for the Seventh Circuit, in which court the decrees of the lower court were reversed and the cases were remanded to the court below with instruction to dismiss the bills for want of equity. Tr. pp. ———

Application is now made to this court for a writ of *certiorari* to bring these cases before this court to review the decision of said Circuit Court of Appeals. This writ, these respondents contend, should be denied for the reasons which appear in the subsequent pages of this brief.

Brief of Argument.

PROPOSITION I.

Power Sparingly Exercised.

This court will sparingly exercise the power to require, by *certiorari* or otherwise, a case to be certified to it by a Circuit Court of Appeals, and will do so "only when the circumstances of the case show that the importance of the questions involved, the necessity of avoiding conflict between two or more courts of appeal, or between courts of appeal and the courts of a state, or some matter affecting the interest of the nation in its internal or external relations, demands such exercise."

AUTHORITIES.

(U. S.) *Forsyth v. Hammond*, 166 U. S., 514, 41 L. Ed., 1095.

(U. S.) *Am. Const. Co. v. Jack. Ry. Co.*, 148 U. S., 383, 37 L. Ed., 486.

(U. S.) *In re Woods*, 143 U. S., 202, 36 L. Ed., 125.

(U. S.) *Lau Ow Bew Petitioner*, 141 U. S., 583, 35 L. Ed., 868.

(U. S.) *Lau Ow Bew v. United States*, 144 U. S., 58, 36 L. Ed., 340.

PROPOSITION II.

Decisions are in Harmony with Precedents.

Not only do these cases not come within the purview of the rule defining the circumstances under which this power will be exercised, but a decision contrary to that rendered by the Circuit Court of Appeals would contravene the spirit and

purpose of the statute granting this power, and would create, rather than prevent, a "conflict between two or more courts of appeal," and "between courts of appeal and the courts of a state."

AUTHORITIES.

- (U. S.) *So. Ex. Co. v. The Western etc. Co.*, 99 U. S., 191, 25 L. Ed., 319.
- (U. S.) *Kerrick v. Hannaman*, 168 U. S., 328, 42 L. Ed., 484.
- (U. S.) *Marble Co. v. Ripley*, 10 Wall., 339, 355, 19 L. Ed., 955, 961.
- (Fed.) *Fed. Oil Co. v. Western Oil Co.*, 121 Fed. Rep., 674.
- (Fed.) *Huggins v. Daley*, 99 Fed. Rep., 606, 48 L. R. A., 320.
- (Fed.) *Foster v. Elk Fork Oil and Gas Co.*, 90 Fed. Rep., 178.
- (Ill.) *Ulry v. Keith*, 237 Ill., 284, 86 N. E. Rep., 696.
- (Ill.) *Watford Oil Co. vs. Shipman*, 233 Ill., 9, 84 N. E. Rep., 53.
- (Ill.) *Cortelyou v. Barnsdell*, 236 Ill., 138, 86 N. E. Rep., 200.
- (Ill.) *Weaver v. Weaver*, 109 Ill., 225.
- (Ill.) *Lancaster v. Roberts*, 144 Ill., 213, 33 N. E. Rep., 27.
- (Ill.) *Vogle v. Peakoc*, 157 Ill., 339, 42 N. E. Rep., 786.
- (Ill.) *Welty v. Jacobs*, 171 Ill., 624, 49 N. E. Rep., 723, 40 L. R. A., 98.
- (Ill.) *Chicago Mun. Gas Light Co. v. Town of Lake*, 130 Ill., 42, 22 N. E. Rep., 616.
- (Ill.) *East St. Louis etc. Co. v. City of E. St. Louis*, 182 Ill., 433, 55 N. E. Rep., 533.
- (Ill.) *Cleveland v. Martin*, 218 Ill., 73, 75 N. E. Rep., 772.
- (Ill.) *Bauer v. Lumaghi Coal Co.*, 209 Ill., 316, 70 N. E. Rep., 643.

PROPOSITION III.

Oil Leases,—How Construed.

Because of the peculiar character of oil and gas, as "property," and the violent fluctuations in the value of lands and lease-holds incident to the discovery of these substances in the vicinity, the courts have placed contracts of this kind in a class by themselves, and in the light of the known character of the business of "oil mining," construe them most strictly against the lessee and favorable to the lessor.

AUTHORITIES.

(U. S.) *Twil-Link Oil Co. v. Marbury*, 91 U. S., 593, 23 L. Ed., 331.

(U. S.) *Ohio Oil Co. v. Indiana*, 177 U. S., 190, 44 L. Ed., 729.

(Fed.) *Huggins v. Daley*, 99 Fed. Rep., 606, 48 L. R. A., 320.

(Fed.) *Federal Oil Co. v. Western Oil Co.*, 112 Fed. Rep., 373.

(W. Va.) *Parish Fork Oil Co. v. Bridgewater Gas Co.*, 51 W. Va., 583, 42 S. E. Rep., 655, 59 L. R. A., 566.

(W. Va.) *Steelsmith v. Gartlan*, 45 W. Va., 27, 29 S. E. Rep., 978, 44 L. R. A., 107.

(W. Va.) *Betman v. Harness*, 42 W. Va., 433, 21 S. E. Rep., 271, 36 L. R. A., 566.

(Pa.) *Venture Oil Co. v. Fretts*, 152 Pa., 451, 25 Atl. Rep., 732.

Bryan on "Petroleum and Natural Gas," p. 146.

Donahue on "Petroleum and Gas," p. 149 *et sequitur*.

Thornton on "The Law Relating to Oil and Gas," p. 98 *et seq.*

PROPOSITION IV.

The Contracts are Inequitable.

The instruments upon which the petitioners base their demand for relief should not be enforced in a court of equity because they are deceptive, unjust, unequal, unfair and inequitable; while they purport to be for the "sole and only purpose of mining and operating for oil and gas," they contain no provision requiring this "purpose" to be accomplished, but permit the lessee to hold the premises dormant for the purpose of speculation, thus defeating the very purpose for which they were given.

AUTHORITIES.

(U. S.) *Nash v. Towne*, 72 U. S., 689, 18 L. Ed., 527, 529.

(Fed.) *Federal Oil Co. v. Western Oil Co.*, 121 Fed. Rep., 674.

(Fed.) *Huggins v. Daley*, 99 Fed. Rep., 606, 48 L. R. A., 320.

(Mich.) *Rust v. Conrad*, 47 Mich., 449, 41 Am. Rep., 720.

High on Injunctions Vol. 1, (3rd Ed.) Sec. 's 22, 701.

Am. & Eng. Encyc. of Law, Vol. 10, (1st Ed.) p. 784 *et sequitur*.

Cyc. of Law and Procedure, Vol. 22, (1st Ed.) p. 749.

PROPOSITION V.

Want of Consideration and Mutuality.

The leases owned by the petitioners, and upon which they base these actions, are not enforceable in a court of equity (a) for want of Consideration, (b) for want of Mutuality of Engagement and (c) for want of Mutuality of Remedy.

(a) WANT OF CONSIDERATION

The consideration for the leases in question was not the recited \$1.00, nor the 25 cents mentioned, but the real consideration was the development of the premises for, and, if found, the production of oil and gas, and the rents and royalties resulting therefrom and dependent thereon. "If the lease fails to bind the lessee to diligent search for oil and gas, it is without consideration, binding upon neither party, and voidable at the pleasure of either."

AUTHORITIES.

- (Fed.) *Federal Oil Co. v. Western Oil Co.*, 121 Fed. Rep., 674.
- (Fed.) *Federal Oil Co. v. Western Oil Co.*, 112 Fed. Rep., 373.
- (Fed.) *Huggins v. Daley*, 93 Fed. Rep., 606, 48 L. R. A., 320.
- (Fed.) *Foster v. Elk Ford Oil Co.*, 90 Fed. Rep., 178.
- (Fed.) *Elk Fork Oil Co. v. Jennings*, 80 Fed. Rep., 839.
- (Tex.) *Natural Gas Co. v. Teel*, 67 S. W. Rep., 545, 68 S. W. Rep., 933.
- (W. Va.) *Eclipse Oil Co. v. South Penn. Oil Co.*, 47 W. Va., 84, 34, S. E. Rep., 923.
- (W. Va.) *Trees v. Eclips Oil Co.*, 47 W. Va., 107, 34 S. E. Rep., 933.
- (W. Va.) *Parish Fork Oil Co. v. Bridgewater Gas Co.*, 51 W. Va., 583, 42 S. E. Rep., 655, 59 L. R. A., 566.
- (W. Va.) *Steelsmith v. Gartlan*, 45 W. Va., 27, 29 S. E. Rep., 978, 44 L. R. A., 107.
- (W. Va.) *Crawford v. Richey*, 43 W. Va., 252, 27 S. E. Rep., 220.
- (Penn.) *Venture Oil Co. v. Fretts*, 152 Pa. St., 451, 25 Atl. Rep., 732.

(Penn.) *Cassel v. Crothiers*, 193 Pa. St., 193, 44 Atl. Rep., 446.

(Ind.) *Gadbury v. Ohio Oil etc. Co.*, 162 Ind., 9, 67 N. E. Rep., 259, 62 L. R. A., 895.

(b) WANT OF MUTUALITY OF ENGAGEMENT

"Contracts, unperformed, optional as to one of the parties, are optional as to both."

AUTHORITIES.

U. S.) *So. Express Co. v. Western N. C. R. R. Co.*, 99 U. S., 191, 25 L. E., 319.

(Fed.) *Huggins v. Daley*, 99 Fed. Rep., 606, 48 L. R. A., 320.

(Fed.) *Federal Oil Co. v. Western Oil Co.*, 121 Fed. Rep., 674.

(Fed.) *Federal Oil Co. v. Western Oil Co.*, 112 Fed. Rep., 373.

(Fed.) *Reece v. Zinn*, 103 Fed. Rep., 97.

(Fed.) *Cold Blast T. Co. v. Kansas City etc. Co.*, 111 Fed. Rep., 77, 57 L. R. A., 696, 699.

(Fed.) *Am. Cotton Co. v. Kirk*, 68 Fed. Rep., 791.

(Fed.) *Crane v. Crane Co.*, 105 Fed. Rep. 869.

(Ill.) *Weaver v. Weaver*, 109 Ill., 225.

(Ill.) *Lancaster v. Roberts*, 144 Ill., 213, 33 N. E., 27.

(Ill.) *Vogle v. Peakoc*, 157 Ill., 339, 42 N. E., 786.

(Ill.) *Welty v. Jacobs*, 171 Ill., 624, 49 N. E., 723, 40 L. R. A., 98.

(Ill.) *Chicago Mun. Gas Light Co. v. Town of Lake*, 130 Ill., 42, 22 N. E., 616.

(Ill.) *East St. Louis etc. Co. v. City of E. St. Louis*, 182 Ill., 433, 55 N. E., 533.

(Ill.) *Cleveland v. Martin*, 218 Ill., 73, 75 N. E., 772.

- (Ill.) *Bauer v. Lumaghi Coal Co.*, 209 Ill., 316, 70 N. E., 643.
- (Ill.) *Watford Oil and Gas Co. v. Shipman*, 233 Ill., 9, 84 N. E., 53.
- (Ill.) *Cortelyou v. Barnsdall*, 236 Ill., 138, 86 N. E., 200.
- (Ill.) *Ulry v. Keith*, 237 Ill., 284, 86 N. E., 696.
- (Mich.) *Rust v. Conrad*, 47 Mich., 449, 41 Am. Rep., 720.
- (Ala.) *Iron Age Pub. Co. v. W. U. Tel. Co.*, 83 Ala., 493, 3 Am. St. Rep., 758.
- (W. Va.) *Eclipse Oil Co. v. South Penn. Oil Co.*, 47 W. Va., 84, 34 S. E., 923, 20 Morison Min. Rep., 234.
- (W. Va.) *Snodgrass v. South Penn. Oil Co.*, 47 W. Va., 509, 35 S. E., 820.
- (W. Va.) *Steelsmith v. Gartlan*, 45 W. Va., 27, 44 L. R. A., 107.
- (La.) *Campbell v. Lambert*, 36 La. Ann., 35, 51 Am. Rep., 1.
- (Wis.) *Hoffman v. Maffoli*, 104 Wis., 630, 47 L. R. A., 427.
- (Tex.) *Nat. O. & Pipe Line Co. v. Teel*, 67 S. W., 545.
- (Ind.) *Fowler Utility Co. Gray*, 168 Ind., 1, 79 N. E., 897.
- (Ind.) *Gadbury v. Ohio etc. Co.*, 162 Ind., 9, 67 N. E., 259, 62 L. R. A., 895.
- Donohue on "*Petroleum and Gas*", p. 155.
- Cyc. of Law and Procedure*, Vol. 22, 950.

(c) WANT OF MUTUALITY OF REMEDY

"A court of equity never interferes where the power of revocation exists."

AUTHORITIES.

- (U. S.) *Southern Express Co. v. The Western etc. Co.*, 99 U. S., 191, 25 L. Ed., 319.

- (U. S.) *Kerrick v. Hannaman*, 168 U. S., 328, 336, 42 L. Ed., 484.
- (U. S.) *Rutland Marble Co. v. Ripley*, 10 Wall, 339, 359, 19 L. Ed., 955, 961.
- (Fed.) *Federal Oil Co. v. Western Oil Co.*, 121 Fed. Rep., 674.
- (Fed.) *Federal Oil Co. v. Western Oil Co.*, 112 Fed. Rep., 373.
- (Fed.) *Reese V. Zinn*, 103 Fed. Rep., 97.
- (Minn.) *Alworth v. Seymore*, 44 N. W. Rep., 1,030.
- (Mich.) *Rust v. Conrad*, 47 Mich., 449, 41 Am. Rep., 720.
- (Ala.) *Iron Age Pub. Co. v. W. U. Tel. Co.*, 83 Ala., 498, 3 Am. St. Rep., 758.
- (Ind.) *Fowler Utility Co. v. Gray*, 168 Ind., 1, 79 N. E. Rep., 897.
- (Ill.) *Welty v. Jacobs*, 171 Ill., 624, 49 N. E. Rep., 728.
- (Ill.) *Watford Oil Co. v. Shipman*, 233 Ill., 9, 84 N. E. Rep., 53.
- (Ill.) *Ulry v. Keith*, 237 Ill., 284, 86 N. E. Rep., 696.

PROPOSITION VI.

No Tender of Performance.

The complainants should not recover in this action for the reason that they have neither done equity by performing nor by tendering performance of the optional provisions of the leases, nor in their bill do they offer to do equity by offering to perform whatever the court may decree ought to be done on their part.

AUTHORITIES.

- (U. S.) *Kelsey v. Crowther*, 162 U. S., 404, 40 L. Ed., 1, 017.

(Fed.) *Federal Oil Co. v. Western Oil Co.*, 121 Fed. Rep., 675.

(N. J.) *Richards v. Green*, 23 N. J. Eq., 536.

Story's Equity Jurisprudence Sec., 736.

Pomroy's Specific Performance, Sec., 330.

PROPOSITION VII.

Condition Precedent

The completion of a well upon the demised premises within the time stipulated (nine months) was a condition precedent to the vesting of any estate. And at the expiration of the time given in which to make the preliminary test, none having been made, the lessor had a right to avoid the lease by leasing to another.

AUTHORITIES.

(Fed.) *Huggins v. Daley*, 99 Fed. Rep., 606.

(Fed.) *Federal Oil Co. v. Western Oil Co.*, 112 Fed. Rep., 373.

(Fed.) *Foster v. Elk Fork Oil Co.*, 90 Fed. Rep., 178.

(W. Va.) *Parish Fork Co. v. Bridgewater Gas Co.*, 51 W. Va., 583, 59 L. R. A., 566, 42 S. E. Rep., 655.

(W. Va.) *Crawford v. Richey*, 43 W. Va., 252, 27 S. E. Rep., 220.

(W. Va.) *Stclsmith v. Gartlan*, 45 W. Va., 27, 44 L. R. A., 107.

(Ind.) *Gadbury v. Ohio etc. Co.*, 162 Ind., 9, 67 N. E. Rep., 259, 62 L. R. A., 895.

(Penn.) *Oil Co. v. Fretts*, 152 Pa. St., 451.

PROPOSITION VIII.

Laches

The lease of the complainants should not be enforced in a court of equity because of the **LACHES** of the complainants in that they failed to carry out the purpose of the lease, but stood by awaiting the result of developpment by others; the fruit of whose enterprise, labor and money, they now seek to appropriate.

AUTHORITIES.

(U. S.) *Hollingsworth v. Fry*, 4 Dall., 345, Book 1, Law Ed., 331.

(U. S.) *Twin Link Oil Co. v. Marbury*, 91 U. S., 593, 23 Law Ed., 331.

(U. S.) *Johnson v. Standard Mining Co.*, 148 U. S., 360, 37 Law Ed., 480.

(Fed.) *Federal Oil Co. v. Western Oil Co.*, 112 Fed. Rep., 373.

(Fed.) *Huggins v. Daley*, 99 Fed. Rep., 606, 48 L. R. A., 320.

(Pa.) *Munroe v. Armstrong*, 96 Pa. St., 307.

(Pa.) *Cassel v. Crothers*, 193 Pa. St., 359.

(Pa.) *Venture Oil Co. v. Fretts*, 152 Pa. St., 451.

(W. Va.) *Iron Co. v. Trout*, 83 W. Va., 409, 2 S. E. Rep., 713.

(W. Va.) *Steelsmith v. Gartlan*, 45 W. Va., 27, 44 L. R. A., 107.

Cyc. of Law & Pro., Vol. 16, pp. 161, 162.

Am. & Eng. Enc. of Law, (1st Ed.) Vol. 22, p. 1,043.

PROPOSITION IX.

Amity Between State and Federal Courts.

Instruments of the character of those involved in these cases relate to property and affect titles, and when construed by the highest courts of a state, that construction fixes the legal status of such instruments and becomes a rule of property in that state, which the Federal Courts will recognize and follow.

AUTHORITIES.

- (U. S.) *Ohio Oil Co. v. Indiana*, 177 U. S., 583, 44 L. Ed., 729.
- (Fed.) *Federal Oil Co. v. Western Oil Co.*, 121 Fed., Rep., 675.
- (Fed.) *Huggins v. Daley*, 99 Fed. Rep., 606, 48 L. R. A., 320.
- (Fed.) *Foster v. Elk Fork Oil Co.*, 90 Fed. Rep., 178.

PROPOSITION X.

The Rule In Illinois.

It has been established, as a rule of property in the state of Illinois, by the Supreme Court of that state, that a lease of the character of those involved in these cases, vests no present title in the lessee, but is a mere option, or license, which the grantor may withdraw at any time before the grantee has done some act by which he binds himself to perform the optional provisions of the lease.

AUTHORITIES.

- (Ill.) *Ulry v. Keith*, 237 Ill., 284, 86 N. E. Rep., 696.
- (Ill.) *Watford Oil Co. v. Shipman*, 233 Ill., 9, 84 N. E. Rep., 53.
- (Ill.) *Cortelyou v. Barnsdall*, 236 Ill., 138, 86, N. E. Rep., 200.

Argument.

PROPOSITION I.

Power Sparingly Exercised.

This court will sparingly exercise the power to require, by *certiorari* or otherwise, a case to be certified to it by a Circuit Court of Appeals, and will do so "only when the circumstances of the case show that the importance of the questions involved, the necessity of avoiding conflict between two or more courts of appeal, or between courts of appeal and the courts of a state, or some matter affecting the interest of the nation in its internal or external relations, demands such exercise."

As we view the present status of these cases, no useful purpose would be served by an exhaustive discussion of their merits. The only questions which we think pertinent at this time are, *first*, the power of the court to require, by writ of *certiorari*, these cases to be brought before it for review, and, if this power be conceded, *second*, the propriety of doing so.

As to the Power.

Jurisdiction of the court in which these cases originated was based wholly upon the ground of diversity of citizenship of the parties. This brings these cases within Section 6 of the Judiciary Act of 1891, in which it is provided that "the judgments and decrees of the Circuit Court of Appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy, being aliens and citizens of the United States, or citizens of different states."

The same section also provides that: "In any such case as is hereinbefore made final in the Circuit Court of Appeals,

it shall be competent for the Supreme Court to require, by *certiorari* or otherwise, any such case to be certified to the Supreme Court for its review and determination with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court."

Under these provisions of the statute, we concede the power of this court to grant the writ in these cases.

As to the Propriety.

The purpose of the Act, creating the Circuit Court of Appeals, was to relieve the congested condition of the Supreme Court, to the end that justice might be more speedily administered and the time of this court devoted to the graver and more important questions demanding judicial determination. Accordingly, it has been held that this power will be sparingly exercised. In the case of *Forsyth v. Hammond*, 166 U. S., 514, 41 L. Ed., 1095, in discussing the scope and purpose of the statute and the powers conferred by it, Mr. Justice Brewer, speaking for the court said:

"Obviously, a power so broad and comprehensive, if carelessly exercised, might defeat the very thought and purpose of the Act creating the courts of appeal. So exercised, it might burden the docket of this court with cases which it was the intent of Congress to terminate in the courts of appeal and which, brought here, would simply prevent that promptness of decision which in all judicial actions is one of the elements of justice.

"So it has been that this court, while not doubting its power, has been chary of action in respect to *certioraris*. It has said: 'It is evident that it is solely questions of gravity and importance that the Circuit Court of Appeals should certify to us for instruction; and that it is only when such questions are involved that the power of this

court to require a case in which the judgment and decree of the Circuit Court of Appeals is made final, to be certified, can be invoked.' *Ex parte Lau Ow Bew*, 141 U. S., 583, 587; *Ex parte Woods*, 143 U. S., 202; *Lau Ow Bew, v. United States*, 144 U. S., 47, 58; *American Cost. Co. v. Jacksonville T. & K. W. R. Co.*, 148 U. S., 372, 383."

And further defining the scope of this power and designating the class of cases in which it will be exercised, this court, in the same case, further said:

"We reaffirm in this case the propositions heretofore announced, to wit, that the power of this court in *certiorari* extends to every case pending in the circuit court of appeal, and may be exercised at any time during such pendency, provided the case is one which, but for this provision of the statute, would be finally determined in that court. And, further, that while this power is coextensive with all possible necessities and sufficient to secure to this court a final control over the litigation in all courts of appeal, it is a power which will be sparingly exercised, and only when the circumstances of the case satisfy us that the importance of the question involved, the necessity of avoiding conflict between two or more courts of appeal, or between courts of appeal and the courts of a state, or some matter affecting the interests of this nation in its internal or external relations, demands such exercise."

It is, therefore, the earnest contention of these respondents that these cases do not come within the category defined by the court in which this power will be exercised. While the amount involved is considerable, this is a matter of consequence only to the parties, and not of interest to the public. No question of moment to the nation is involved, and the principles upon which the decisions rest are not new, but are as old as enlightened jurisprudence and familiar to every student of elementary law.

PROPOSITION II.

Decisions are in Harmony with Precedents.

Not only do these cases not come within the purview of the rule defining the circumstances under which this power will be exercised, but a decision contrary to that rendered by the Circuit Court of Appeals would contravene the spirit and purpose of the statute granting this power, and would create, rather than prevent, a "conflict between two or more courts of appeal," and "between courts of appeal and the courts of a state."

Disclaiming any purpose at this time to explore the wide range of precedents supporting the decisions rendered in these cases by the Circuit Court of Appeals, we wish now to point out only a few of the ruling precedents with which a decision contrary to that rendered would be in conflict.

The decision rendered in these cases is predicated upon the decision of the Circuit Court of Appeals for the Seventh Circuit in the case of *Federal Oil Company v. Western Oil Company*, 121 Fed. Rep., 674. The decision in that case rests upon the familiar rule so often quoted by the courts as to be regarded almost a legal maxim, that, "*contracts, unperformed, optional as to one of the parties are optional as to both.*" In the opinion rendered in that case the court used this language:

The appellant had the right at any time to remove its property and cease operation without respect to the interest of Bradford, and with respect only to its own interest; and it could cancel and annul the contract at any time. There was here an entire want of mutuality,—an utter absence of obligation on the part of the appellant. *Equity will not specifically enforce a contract against one party when it can not be specifically enforced against the other.* *Marble Co. v. Ripley*, 10 Wall., 339, 359, 19 L. Ed., 955;

Kerrick v. Hannaman, 168 U.S., 328, 336, 18 Sup. Court, 135, 42 L. Ed., 484." the Court of Appeals in deciding these cases said:

The Circuit Court of Appeals for the Fourth Circuit is likewise committed to the same doctrine. In the case of *Huggins v. Daley*, 99 Fed. Rep., 606, the rule was applied to an oil lease in character identical with the leases involved in these cases. In a very elaborate and searching opinion, that court, by Judge Brawley, in announcing principles of "oil law" universally recognized and applied to contracts of this character, said:

"The consideration for this lease was the prospective rents and royalties the lessor would enjoy if the lessee, by diligent search, could find oil and gas in paying quantities. If the lease failed to bind the lessee to diligent search for oil and gas, it was without consideration, binding on neither party and voidable at the pleasure of either."

And quoting from the case of *Oil Co. v. Fretts*, 152 Pa., 451, the court used this language:

"He could not be compelled to put down another well, and he not being bound, the lessor was not bound either; for the only consideration left him was the prospective oil royalties and gas rentals which the lessee was in a position to entirely defeat. Contracts, unperformed, optional as to one of the parties, are optional as to both."

In the case of *Foster v. Elk Fork Oil and Gas Co.*, 90 Fed. Rep., 178, the same court asserts the same doctrine and reiterates the familiar rule that: "If the lease fails to bind the lessee to diligent search for oil and gas, it is without consideration, binding on neither party and voidable at the pleasure of either."

In this court also, the same rule obtains. In the case of *Rutland Marble Company v. Ripley*, 10 Wall.,

339, 359, 19 L. Ed., 955, 961, in stating the rule observed by the Court of Appeals in deciding these cases, this court, by Mr. Justice Field, said:

"Another reason why specific performance could not be decreed in the case, is found in the want of mutuality. Such performance by Ripley could not be decreed at the suit of the marble company, for the contract expressly stipulates that he may relinquish the business and abandon the contract at any time on the giving of one year's notice. And it is a general principle that when, from personal incapacity, the nature of the contract, or any other cause, a contract is incapable of being enforced against one party, that party is equally incapable of enforcing it against the other, though its execution in the latter way might in itself be free from the difficulty attending its execution in the former."

In the case of *Southern Express Company v. The Western N. C. R. R. Co.*, 90 U. S., 191, 25 L. Ed., 319, the rule was applied by this court in a most summary manner. In speaking for the court, Mr. Justice Swayne, after stating the case, said:

"But we need not pursue the subject further, because there is one provision of the contract in this case which is fatal to the relief sought. *A court of equity never interferes where the power of revocation exists.*

"The contract stipulates that after the first year, it shall cease upon the payment of \$20,000 and interest. This might be made immediately upon the rendition of the decree. The action of the court would thus become a nullity."

In the case of *Kerrick v. Hannaman*, 168 U. S., 328, 336, 42 L. Ed., 484, 490, this court, by Mr. Justice Gray, reiterated and emphasized the rule announced in *Marble Company v. Ripley*, *supra*, and which was followed by the Circuit of Appeals

in deciding the case of *Federal Oil Co. v. Western Oil Co.*, *supra*.

Not only so, but, in a multitude of cases, the Supreme Court of the state of Illinois has announced the same rule. Many of these cases are cited under this and another topic in the brief preceding this argument. For our present purpose, we will refer to only enough of these cases to show the established doctrine upon this subject in that state.

In the case of *Vogle v. Peakoc*, 157 Ill., 339, 42 N. E. Rep., 386, the court said:

"Here the contract implies no obligation on one of the parties, hence it is void for want of mutuality. The contract being void, it will not be necessary to inquire whether the amount which it was provided might be retained, was penalty or liquidated damages."

We also invite the attention of the court to the case of *Baur v. The Lumaghi Coal Co.*; 209 Ill., 316, 70 N. E. Rep., 634, for the reason that the "want of mutuality" in that case is similar to the purpose which inspired the second party in these cases to endeavor to bind the first party, in the event that it should prove advantageous to do so, and at the same time to leave the second party free to perform or not to perform, to abandon or proceed as he might elect.

We also call attention to the case of *Welty v. Jacobs*, 171 Ill., 624, 49 N. E. Rep., 728, because of the very lucid manner in which the rule is applied to the subject of "negatively" enforcing a contract of this kind by enjoining its breach.

In the case of *Ulry v. Keith*, 237 Ill., 284, 86 N. E. Rep., 696, in a very searching opinion, in which many of the authorities are reviewed, the rule is applied to an oil lease in every essential respect identical with the leases involved in these cases.

Thus, it will be seen, that to grant the writ prayed for in these cases, would not only "defeat the very thought and purpose of the Act creating the courts of appeal," as interpreted by this court, but a decision contrary to that rendered in these cases by the Circuit Court of Appeals, would create, rather than prevent, a "conflict between two or more courts of appeal," and "between courts of appeal and the courts of a state."

PROPOSITION III.

Oil Leases,—How Construed.

Because of the peculiar character of oil and gas, as "property," and the violent fluctuations in the value of lands and lease-holds incident to the discovery of these substances in the vicinity, the courts have placed contracts of this kind in a class by themselves, and in the light of the known character of the business of "oil mining," construe them most strictly against the lessee and favorable to the lessor.

Even in that class of cases in which the power will be exercised, it would be a vain thing for this court to reach out, by *certiorari* and bring a case before it for review, if the decision to be reviewed is correct and should be affirmed. And while we feel that for the reasons already stated, the writ should be denied, in the subsequent pages of this argument we will endeavor to show that the decision rendered in these cases is correct and, therefore, no reason exists for granting the writs prayed for.

Leases for oil and gas purposes occupy a place in modern jurisprudence distinct and apart from precedents established in relation to contracts generally. This is true, in a measure, because of the peculiar nature of these substances. Their origin, their characteristics, the manner of obtaining them, the uses to which they may be put and the manner in which they must be transported in applying them to these uses, all go to place

them in a class by themselves, and new rules have been created and applied to the necessities and conditions which have grown out of the great and important industries incident to their use and ownership.

Principles established in relation to mining contracts, generally, do not apply for the reason that stable minerals having a fixed *situs* such as coal, iron and the precious ores, are a part of the land and belong to the owner thereof and may be owned or alienated separate from the soil. They remain in place until removed by some external agency, and when removed, are not replaced by natural causes from unknown sources.

Not so with oil and gas. Because of the volatile character of these substances and their consequent vagrant and migratory habit, they are incapable of ownership in their natural state and have been classed as minerals *ferae naturae*. And because of their elusive tendency, lands, which, if operated at an opportune time would prove an Eldorado to the owner, may become sapped, depleted and worthless to him through the laches of the lease holder who, through design or otherwise, would take, or suffer to be taken, these valuable fluid-minerals through wells on adjacent lands, and thus deprive the land owner of that which should be his.

Not only so, but the immense profits obtained from the discovery of oil and gas, and the violent fluctuations in the value of this class of property incident to their discovery, are conducive to speculative schemes and questionable methods resorted to by a certain element engaged in the business, not only for the purpose of gaining an undue advantage in obtaining leases and in conducting the business, but in an endeavor to outwit the courts and to evade, by cunningly devised subterfuges, many of the decisions which have been rendered. These are matter of common knowledge of which the courts take judicial notice and in many instances have caused the courts to become outspoken and to lay hold of refractory litigants with a

strong and resolute hand, as will be seen in the cases cited in the subsequent pages in this argument.

Indicative of the vigor with which many of the courts have spoken, is the following language of Judge Brawley of the Circuit Court of Appeals of the Fourth Circuit, in the case of *Huggins v. Daley*, 99 Fed. Rep., 606:

"The proof is clear that he never intended to drill a well within the time stipulated. The proviso was written by the lessee evidently for the purpose of deception. He knew the object of the lessor was to secure diligent search for oil, and he was 'keeping the word of promise to the ear and breaking it to hope,' skillfully turning it into a mere speculative lease, binding the lessor and leaving himself free. 'Law, as a science, would be unworthy of the name, if it did not to some extent, provide the means of preventing the mischiefs of improvidence, rashness, blind confidence and credulity, on the one side, and of skill, avarice, cunning and a gross violation of the principles of morals and conscience on the other.' "

In speaking of the rules employed in construing oil and gas leases, Bryan, in his work on "Petroleum and Natural Gas," p. 146, says:

"As will be seen from an examination presently to be made, the trend of decisions touching questions of forfeiture arising out of oil and gas leases, has been almost uniformly in favor of the lessor. Generally it is the lessee who is favored, and after a substantial compliance by him with the terms of the contract, equity will not regard a technical breach. But, with mining leases, it is otherwise. This is due, principally, if not entirely, to the nature of the business of mining, and more especially, oil mining; to the temptation offered the shrewd operator to purchase at a nominal price the right of developing the lands, the

owner of which is ignorant of their value for any purpose, and then to hold them indefinitely, should it suit his purpose, neither working them himself, nor permitting another to do so.

"Of course, it may be said in a general way, that parties may make any contract which they desire, and if the lessor should, by way of lease, make his intention clear to grant the oil and gas right upon his property for an inadequate consideration, the courts will enforce it. But the lessee, where the instrument presents a semblance of inequality or unfairness, will find that he has a thorny road to travel before reaching a judicial establishment of his claims."

In Thornton on "The Law Relating to Oil and Gas," p. 98, the rule is stated that "such leases are construed most strictly against the lessee and favorable to the lessor," citing many authorities.

In the case of *Parish Fork Oil Co. v. Bridegwater Gas Company*, 51 W. Va., 583, 59 L. R. A., 566, the rule is stated that "an oil lease will be so construed as to promote development and prevent delay and unproductiveness."

In the case of *Federal Oil Co. v. Western Oil Co.*, 112 Fed. Rep., 373, and in many other cases, is found the statement that "oil leases stand on quite different grounds from leases of other property," and running through all of the cases having to do with this class of property will be found the doctrine that contracts of the character of these here involved, are in a class by themselves and governed by rules peculiarly applicable to the business of "oil mining" and which have been fashioned in the forge of experience in the light of public and private necessity.

Evolution of the Oil Lease.

While petroleum, under various names, has been known for

more than twenty centuries, and has been put to many uses, both ancient and modern, the "oil lease" as we have it today is of recent origin. The first lease of land for oil purposes bore date of January 16, 1855. It covered a small island at the junction of Pine Creek and Oil Creek in Cherrytree Township, Venango County, near Titusville, Pennsylvania. It was given to the Pennsylvania Rock Oil Company, the first oil company incorporated in America. It was for a term of ninety-nine years, and the consideration paid for it was five thousand dollars. Out of this transaction came the famous Drake well in which oil was "struck" on August 28, 1859, at a depth of sixty-nine and one-half feet.

The excitement incident to this discovery was intense. At first, under various names, petroleum was sold as a medicine at exorbitant prices. Later, in 1861, when its uses became more diversified, it was sold in the oil region for twenty dollars a barrel. These prices were a potent incentive to development and gave impetus to the frantic effort to obtain the oil rights upon prospective territory. At first these rights were purchased for a fixed price,—the royalty plan of leasing came later.

These early leases were obtained for the purpose of development with a view to obtaining rich returns from production. As a consequence, even under the crude methods then employed, development was rapid and the increase of production was so great that in November, 1861, oil brought but five cents a barrel at the well, the lowest for which it ever sold. This, however, was due largely to the limited uses to which it was then put and the lack of facilities for transporting it. After better methods of transportation were devised, the price increased, and in 1864, it sold for fourteen dollars a barrel.

With the marvelous increase of the business, the spirit of speculation became rife. Men of great ability and shrewdness were attracted by the fabulous fortunes to be garnered in so short a time from this new field of enterprise, and soon there

appeared upon the scene what is known in oil parlance as the "scalper,"—one who acquires the oil rights upon prospective territory at a nominal cost, not for the purpose of development, but to speculate upon the result of future development by others.

To this end there was invented a form of lease containing what is known as the "unless clause." If that clause were used in these leases, it would be worded thus: "In case no well is completed on said premises within nine months from this date, then this grant shall become null and void *unless* the second party shall thereafter pay at the rate of 25 cents a year, quarterly in advance, until a well is completed."

It will be observed that in this form of lease there is no promise to either complete a well or to pay, and under it the lessee sought to hold the premises so long as he paid this "rental," and upon failure to pay, the lease terminated automatically without a formal surrender. This was the pioneer "scalper's lease," and under it thousands of acres in the oil and gas regions were tied up and held dormant awaiting development in the vicinity by others, for the purpose of speculation.

But the courts were appealed to for relief and they held these leases void for want of mutuality, adopting the familiar rule that, "contracts, unperformed, optional as to one of the parties, are optional as to both."

To evade this rule, the resourceful speculator adopted a modified form in which was inserted a promise to pay a certain stipulated sum until a well should be "*commenced*." Under this form, it was claimed that a well was "*commenced*" by merely driving a stake, or by placing some idle drilling machinery or an abandoned derrick, or the like, upon the premises, or by actually penetrating the earth a few feet and then suspending further work. This lease also went down before the courts when they held that, "if such lease fails to bind the lessee to

diligent search for oil and gas, it is without consideration, binding on neither party and voidable at the pleasure of either."

But the speculator is not yet dismayed. To evade this rule, the form was changed and there was placed in the lease a promise to "complete" a well within a certain time, or thereafter pay a stipulated sum until a well should be "completed." Under this form, a well would be said to be completed after a most indifferent effort, or if in fact completed, it would be "shut in" and the premises held dormant for speculating purposes. But this lease also went down under the rule announced in *Steel-smith v. Gartlan, supra*, and emphasized in a multitude of cases, notably, *Foster v. Elk Fork Oil Co., supra*, *Huggins v. Daley, supra*, *Parish Fork Oil Co. v. Bridgewater Gas Co., supra*, and many others,—that while "the completion of a well saves the penalty, it does not amount to a fulfillment of the covenants;" that "the discovery and production of oil or gas is a condition precedent to the continuance or vesting of any estate in the demised premises."

In this race between the speculator and the courts, the form of lease in these cases was evolved, which is the very acme of inventive genius. It contains in veiled form, all of the vices of its predecessors and one more,—the right to surrender at any time. While it is profuse in its apparent promises to develop and produce, the lessee, in fact, is not bound to do anything, but promises to pay a nominal sum until a well is completed, thus supplying a colorable consideration for the grant, but which may be evaded under the "surrender clause."

As between the two, the lease containing the "unless clause" is the more equitable. Under it, if the lessee fail to pay or develop, the lease automatically terminates and ceases to be a cloud upon the lessor's title. Under it, the holder thereof can not stand idly by and neither pay nor develop, as was true in these cases, and see the premises developed at the

risk, labor and expense of another, and then decide, when the danger is past, as to whether he will assert his claim or surrender it. Under one form, in case no work be done, the lease becomes void, *unless* the lessee pay; under the other, in case no work be done, the lessee must pay *unless* he elect to avoid it. In one it is optional with the lessee as to whether he will pay or allow the lease to lapse by its own terms; in the other, it is optional with the lessee as to whether he will pay or surrender the lease. While in form, there may be a distinction between these leases, in effect, there is none; and the courts, looking to the substance, rather than to the form, have consistently and persistently refused to enforce either, holding both to be "*nudum pactum ex quo non oritur actio*,"—a naked promise from which no action arises.

PROPOSITION IV.

The Contracts are Inequitable.

The instruments upon which the petitioners base their demand for relief should not be enforced in a court of equity because they are deceptive, unjust, unequal, unfair and inequitable; while they purport to be for the "sole and only purpose of mining and operating for oil and gas," they contain no provision requiring this "purpose" to be accomplished, but permit the lessee to hold the premises dormant for the purpose of speculation, thus defeating the very purpose for which they were given.

It is a familiar rule that he who comes into a court of equity seeking equitable relief, must come with "clean hands," and, in cases of this kind, if he recover at all, it must be upon the strength of his own title and upon the merits of his own cause. Equity will not aid a derelict, nor enforce a contract wanting in equity.

In the case of *Federal Oil Co. v. Western Oil Co.*, 121 Fed. Rep., 674, 676, the rule is stated in these words:

"The contract must possess certain elements, to demand of equity the exercise of its jurisdiction to enforce performance. It must be upon a valuable consideration. It must be perfectly fair, equal and just in its terms and in its circumstances, and the situation must be such that the remedy of a specific performance will not be harsh and oppressive. The contract must be such that the court is able to make an efficient decree for its specific performance, and to enforce that decree when made."

And in the case of *Rust v. Conrad*, 47 Mich., 449, 41 Am. Rep., 720, the rule is stated by that eminent scholar, author and jurist, Thomas M. Cooley, with his characteristic force and clearness, thus:

"When a party comes into equity, it should be very plain that his claim is an equitable one. If the contract is unequal; if he has bought land at a price which is highly inadequate; if he has obtained the assent of the other party to unreasonable provisions; if there be any indication of overreaching or unfairness on his part, the court will refuse to entertain his case and turn him over to the usual remedies."

Are the contracts here involved and the conduct of the petitioners in relation thereto such as will claim equitable cognizance?

In construing contracts, the courts will look, not only to the language of the instrument, but to the situation of the parties, the purposes inspiring it and the objects to be attained. They will endeavor to view the whole transaction in the light in which the parties viewed it in order to get the probable meaning of the words employed. As commonly expressed, they

will view the contract from its "four corners" in order to get the intent and purpose of the parties.

In speaking on this subject, Mr. Justice Clifford, in the case of *Nash v. Towne*, 72 U. S., 698, said:

"Courts, in the construction of contracts, look to the language employed, the subject-matter and the surrounding circumstances. They are never shut out from the same light which the parties enjoyed when the contract was executed, and in that view, they are entitled to place themselves in the same situation as the parties who made the contract, so as to view the circumstances as they viewed them, and so to judge of the meaning of the words and of the correct application of the language to the things described."

Let us, then, in so far as it is possible to do so, place ourselves in the situation of the parties to the contracts in controversy, that we may be the better enabled to determine their respective rights.

Here is a woman, Susannah Smith, who is the owner of a small tract of land, containing thirty acres, in Crawford County, Illinois, and her son, James A. Smith, who owns a twenty acre tract adjacent thereto, which is prospectively oil producing. Oil had been discovered in the county just north of them; and they are anxious to avail themselves of this bountiful gift of Nature by having their lands developed, that they may receive their share of this rich heritage. They have neither the knowledge nor the means to develop their lands. They are not in the oil business. Their business is farming. They know no other.

Along comes M. A. Walton, a stranger and resident of West Virginia. He is not a producer, but is what is known among oil men as a "scalper"—one engaged in obtaining leases, not for the purpose of operating, but to speculate upon. He is a professional leaser, schooled in the art of obtaining "marketable"

leases. His experience in this line extends over many years and in many fields, as shown by his own testimony in these cases. He knows the rapid fluctuation in the value of this kind of property; knows that sudden wealth comes to him who holds the oil rights on lands in the region where oil is found. He is provided with blank leases previously prepared with great care to suit his purpose.

These people engage in negotiating a lease on these tracts of land. The land owner is anxious to have the premises developed at an early date in order to obtain the royalty that will come only from production. To this end there is placed in the lease a clause apparently securing an initial well within nine months. The second party covenants and agrees: "1st, to deliver to the credit of the first party, free of cost, the equal one-eighth part of all produced and saved from the leased premises; and, 2nd, to pay \$100 per year for the gas from *each and every* gas well drilled on said premises, the product of which is marketed and used off the premises, said payment to be made on *each well* within sixty days after commencing to use the gas therefrom."

The second party also "covenants and agrees to locate *all wells* so as to interfere as little as possible with the cultivation portion of the farm. And, further, *to complete a well on said premises within nine months from the date hereof*, or pay at the rate of 25 cents per year, quarterly in advance, for each additional three months such completion is delayed."

Provision is also made for "laying of pipe lines and building tanks, stations and structures to take care of said products" and for "the privilege of using sufficient water from said premises to run all necessary machinery for drilling and operating thereon". The only portion of said premises exempt from such operation is a radius of "200 feet around the buildings on which no well shall be drilled by either party except by mutual consent."

To the average mind not accustomed to analyzing contracts, it would seem that these people have a contract securing the early development of the premises for oil and gas purposes. On the surface, the language of these instruments contemplates active operation, and if found, the production of oil and gas, and the payment of the rents and royalties resulting therefrom. They are ostensibly given "*for the sole and only purpose of mining and operating for oil and gas.*" This is the purpose recited in the instruments. Not only do they look to the completion of *one* well within nine months, but frequent reference is made to "*each and every well*" and to "*all wells.*"—holding out the interference that there are to be many wells upon the premises.

These leases were executed on the 22nd day of May, 1905, and were immediately taken away by the "second party". They were not even recorded by him on the public records of the county.

The land-owners are hopeful that soon they will begin to enjoy some benefit from the rich treasures which underlie the premises and which await only the action of the lease-holder in carrying out the purpose of the leases as mutually understood by the parties. Much more than the nine months' probationary period goes by and their hopes are not realized. Development in the vicinity shows the premises to be in a rich oil pool. The land on every side is under lease and is being developed and operated and handsome returns from royalties are being realized by the owners, but these lands remain dormant. No word has come from the holder of the leases, and to all appearances they have been abandoned. Even the stipulated penalty for delay has been neither paid nor deposited.

Analyzing the language of these instruments, it is found that, instead securing development of the premises and the production of oil therefrom,—the very thing which inspired

their execution,—they are so worded as to defeat this purpose. They contain no promise or agreement to do any of the things contemplated, but permit the lessee to hold the premises dormant for the purpose of speculating upon the enhancement of the value of the leaseholds, incident to the discovery of oil in the vicinity.

There is an apparent promise "to deliver to the credit of the first party, free of cost, the equal one-eighth part of all oil produced and saved from the leased premises", but there is no promise to ever "produce", or *save* any oil. So, too, is there an apparent promise "to pay \$100 a year for the gas from each and every gas well drilled on the premises, the product of which is marketed and used off the premises," but there is no promise to ever "produce" or "market" or "use" any gas. There is no promise to ever complete a well of any kind on the premises. If none is ever completed, what would be the remedy? Would an action lie, for specific performance? Performance of what? There is no promise to perform anything. In an action for damages, the amount of recovery would be limited to the 25 cents a year mentioned in the instruments, and even the liability for this pittance may be avoided under the surrender clause!

What, then, is the character, purpose and legal *status* of these instruments which are called, or, rather, mis-called, leases and upon which the petitioners base these actions?

Their purpose is obvious. It is a matter of common knowledge that oil property is the most fluctuating in value of anything known as property. The exclusive right to operate upon prospective oil territory may, within a short time, prove immensely valuable. By these instruments, if enforceable, the lessee secured to himself, for the mere sum of one dollar, the prospective enhancement in the value of these premises for a period of nine months, and by the payment of 25 cents a year,

could hold the premises dormant for a period of five years, awaiting development in the vicinity, securing to himself the advantages to be gained thereby without cost to him. Not only so, but if at any time he should so desire, he may avail himself of the surrender clause and be relieved from all obligation unfulfilled. Thus, it will be seen, that while the second party seeks to bind the owner of the land for a period of five years, whereby he stands to reap the enhanced value of the premises incident to the discovery of oil and gas in the vicinity, he remains free to develop or not develop, to hold on or to abandon the premises at his own pleasure.

And, moreover, not only is it within the power of the lessee to deprive the lessors of all income from royalties, because they are without power to compel the doing of the things contemplated by the leases, but they are also deprived of the right to operate upon their own premises, or to procure others to do so, for a period of five years. And these rights for which they received the paltry sum of but one dollar, with the clear understanding that they were to be rewarded in royalties to come only from production, can, in the mean time, be easily sold for Fifty Thousand Dollars. This handsome fortune which was theirs, was intercepted by another under a lease so cunningly worded and designed as to enable him to do so within its letter, but in violation of its spirit and express purpose. Thus, while he is "keeping the word of promise to the ear, he is breaking it to the hope, skillfully turning it into a mere speculative lease, binding the lessor, but leaving himself free".

And these are the leases that a court of equity,—a court of conscience,—is asked to enforce, and this is the transaction to which the court is asked to become an accessory!

PROPOSITION V.

Want of Consideration and Mutuality.

The leases owned by the petitioners, and upon which they

base these actions, are not enforceable in a court of equity (a) for want of Consideration, (b) for want of Mutuality of Engagement and (c) for want of Mutuality of Remedy.

(a) WANT OF CONSIDERATION

The consideration for the leases in question was not the recited \$1.00, nor the 25 cents mentioned, but the real consideration was the development of the premises for, and, if found, the production of oil and gas, and the rents and royalties resulting therefrom and dependent thereon. "If the lease fails to bind the lessee to diligent search for oil and gas, it is without consideration, binding upon neither party, and voidable at the pleasure of either."

It can not with any show of reason be contended that for the sum of one dollar each, Susannah Smith and James A Smith executed the leases in question thereby depriving themselves of the prospective benefits which they would receive from the discovery of oil and gas in that vicinity for a period of nine months, and for the sum of 25 cents a year, or 25 cents an acre a year, for a term of five years. To so contend would be to argue very conclusively that they were not capable of managing their own affairs. None but a *non compos mentis* would so encumber his property and part with rights so valuable for such a pittance. As was said by Judge Baker in the case of *Federal Oil Co. v. Western Oil Co.*, 112 *Fed. Rep.*, 373; "if there was no other consideration which the lessee was bound to yield to the lessor, a court of equity would be bound to refuse the enforcement of the lease. The consideration would be so trifling, compared with the leasehold interest, as to shock the moral sense".

What, then, was the consideration which induced the execution of these instruments? What was the moving cause which inspired the granting of these valuable rights and privileges? The instruments themselves recite that they were given "for the

sole and only purpose of mining and operating for oil and gas". If these money payments were the consideration, why this recital in the lease? These payments are made only in case of failure to "mine and operate", and cease when a well has been completed. Clearly it was the development for and, if found, the production of oil and gas, and the consequent rents and royalties dependent thereon which constituted the consideration for the execution of these instruments.

Do these instruments give to the lessors that consideration? Is there a single promise or covenant requiring the development of the premises or the production of oil or gas,—the accomplishment of the sole and express purpose for which they were given? As has been seen, these instruments do not contain a single promise, covenant or agreement that may not be defeated by the mere will, choice or election of lessee. Where, then, is the consideration to support these contracts? Indeed, do these instruments amount to a contract? Do they not lack at least one essential element of a contract,—the consideration?

In considering these cases let it be kept in mind that no possession was taken of the premises by these petitioners, no money was expended or labor performed by them pursuant to the terms of the leases and, therefore, they have acquired no vested estate in the premises to claim equitable cognizance. If they had taken possession and made development resulting in the finding of oil or gas, then a different question would be presented. The consideration would be supplied by performance and, in such case, performance is as good as a promise to perform. But in these cases, there was neither performance nor a promise to perform, nor yet an offer to perform, hence, no vested rights and no consideration. But the courts have spoken upon this subject more wisely than we are able to do. We will, therefore, let them argue this case for us.

In the case of *Huggins v. Daley*, 99 Fed. Rep., 606, 48 L.

R. A., 320, The United States Circuit Court of Appeals for the Fourth Circuit, in a case in most respects indetical with the cases at bar, on this point, used this language:—

“The consideration for this lease was the prospective rents and royalties the lessor would enjoy if the lessee, by diligent search, could find oil and gas in paying quantities. *If the lease failed to bind the lessee to diligent search for oil and gas, it was without consideration, binding on neither party, and voidable at the pleasure of either.*”

And quoting from the case of *Oil Co. v. Fretts*, 152 Pa., 451, the court uses this language:—

“He could not be compelled to put down another well, and he not being bound, the lessor was not bound either; for the only consideration left him was the prospective oil royalties and gas rentals which the lessee was in a position to entirely defeat. *Contracts, unperformed, optional as to one of the parties, are optional as to both.*”

And again the same court speaking on the subject says:

“The only consideration which moved the lessor to grant the lease was the prospective royalties from oil and gas, which could come only if the lessee complied with the terms of this provision that required the boring of a well; for, while the sum of one dollar is technically a valuable, it is only a nominal consideration. If the contention of plaintiffs is correct, the lessee, Hodges, or his assigns, could have waited the full term of five years without expending one dollar or moving a hand for the development of the leased property, meantime, tying the hands of the owner of the land, forbidding him to make arrangements with any other person for the exploration which the lessee undertook to make, and perhaps suffering irreparable injury from the drainage of his oil or gas. *This is the contract*

which a court of equity is asked to enforce. It is a short view of the range of equitable principles."

In concluding the opinion, the court says:

"We are of the opinion upon the whole case, that the exploration for, and the developing of, oil and gas was the sole consideration for this lease; that the provision requiring the boring of a well within ninety days was a condition precedent to the vesting of any interest to the lessee, and that the forfeiture of \$50.00, was intended merely as a penalty to secure the drilling of a well, and, if paid, would have been merely compensation to the land owner for the right of the lessee to possession during the ninety days, and such payment would not be so far a compliance with the conditions of the lease as to vest in the lessee a title in the leased premises for a period of 5 years; that after the expiration of ninety days from the date of the lease, *there being no provision therein for work to be done by the lessee in the development of the property, which is the sole consideration therefor, the lessor had the option to avoid it.*"

Directly in point also is the case of *Steelsmith v. Gartlan*, 45 W. Va., 27, 44 L. R. A., 107, in which the supreme court of West Virginia used this language:

"Mrs. McGregor entered into the lease for the sole consideration of the prospective rents and royalties she would enjoy if the lessee, by diligent search therefor, should find gas and oil in paying quantities. *If such lease fails to bind the lessee for diligent search for oil and gas, it was without consideration, binding on neither party, and voidable, if not void, at the pleasure of either.*"

In the case of *Foster v. Elk Fork Oil and Gas Co.*, 90 Fed. Rep., 178, the United States Circuit Court of Appeals, Fourth

Circuit, upon the subject now under consideration, used this language:

"The consideration for this lease is the covenants; and these covenants, as has been seen, contemplate active operations on the demised premises, the lessor looking for his reward to the result of these operations and dependent upon them. The clause last quoted fixed the time within which active operations must be commenced, and sets forth the penalty for failure so to begin. If the well has been begun and completed within the year, no money whatever is paid. If not completed then the money payment ceases when a well has been completed. If no well is dug at all, money is paid, not in consideration for the demise, *but as penalty for not digging the well*. Note the language, 'One well.' The digging of one well is the guaranty that the operations,—the consideration for the demise,—has begun. The agreement to dig one well within one year secures the prompt beginning of the operations. The completion of the well saves the penalty. It does not amount to a fulfillment of the covenants.

"The consideration, therefore, for this lease was the prospective rents and royalties the lessor would enjoy if the lessee, by diligent search, could find oil and gas in paying quantities. *'If the lease failed to bind the lessee to diligent search for oil and gas, it was without consideration, binding on neither party, and voidable at the pleasure of either.'*—*Cowen v. Iron Co.*, 83 W. Va., 547, 3 S. E. Rep., 120; *Petroleum Co. v. Coal, Coke and M. Co.*, 89 Tenn., 381, 18 S. W. Rep., 65; *Ray v. Gas Co.*, 139 Pa., 576, 20 Atl. Rep., 1065.

In the case of *Natural Oil and Pipe Line Co. v. Teel*, 67 S. W. Rep., 545, the court of Civil Appeals of Texas had under consideration the same question which we are now considering,

and that court, like every other court that has given an expression upon the subject, held that the real consideration for the demise was the development of the premises for, and the production of, oil and gas. In the opinion the court used this language:

"The real consideration for these instruments was not the recited \$1.00 nor the \$100.00 that after two years might be paid in order to keep it going from year to year, but the beginning and prosecuting, with due diligence, of wells for oil or minerals upon the land; in other words, the development of the property for oil and minerals in the near future. This was the clear purpose of the grant. According to the terms of the contracts, it is left optional when this consideration is to be performed, if ever. They admit of the consideration being withheld absolutely and for all time, without any power on the part of the grantor to insist on performance. In other words, it is left with the vendee and his assigns to abstain from beginning operation and to keep the land from being developed by the vendor or any one else, as long as they see fit, and thereby to withhold altogether the real consideration upon which the contracts were based. The appellees, of course, could have made a gift of these rights, but it is evident that no gift was intended.

"We think an instrument is not a sale which gives the grantee the right or power to withhold the consideration. The absolute control the contracts gave him in respect to performance of the conditions subsequent, and the absence of any right in the vendor to insist on performance, render the same objectionable for want of mutuality. The work was not begun, hence no equities exist in favor of the appellants. They were not bound to perform, and could abandon the matter at any time. *Under these cir-*

cumstances, the appellees were also not bound, and they have the right to annul the contract."

Applicable also to this contention is the case of *Federal Oil Co. v. Western Oil Co.*, 112 Fed. Rep., 373, in which Judge Baker, on page 375, used this language:

"The only consideration yielded at the time of the making of the lease was \$1.00 in hand paid by the complainant to the lessor. As will be seen later, there was no binding promissory consideration on the part of the complainant for the execution of the lease. The bill, which is verified, alleges that the leasehold interest claimer to have been acquired exceeds \$2,000.00 in value. The cash payment, if actually made was merely nominal, and it is quite apparent from a consideration of the terms of the whole lease, that the lessors would not have executed it for such paltry consideration. If there was no further consideration which the lessee was bound to yield to the lessors, a court of equity would be bound to refuse the enforcement of the lease. *The consideration would be so trifling, compared with the value of the leasehold interest, as to shock the moral sense.*"

The above case was appealed to the U. S. Circuit Court of Appeals of the Seventh Circuit where it was affirmed, the opinion by Judges Jenkins and Grosseup being reported in 121 Fed. Rep., 674, and is the decision upon which the same court based its decision in these cases.

In the case of *Gadbury v. Ohio etc. Co.*, 162 Ind., 9, 67 N. E. Rep., 259, 62 L. R. A., 895, in a searching and well considered opinion, the Supreme Court of Indiana, reversing the Appellate Court of that state, very fully analyzed a lease of the character of those in this case, among other things says:

"In determining whether a condition is to be implied,

it is important to note that the substantial consideration which moves the grantor to execute such a grant is the hope of profits or royalties if oil or gas is discovered. Even if the grantee in this case had paid the stated consideration of \$1.00—a technically valuable consideration—yet we must construe the instrument with the fact in view that a more substantial reason prompted the making of the grant.

• • •

“The duty to develop the property upon the discovery of oil or gas in paying quantities, is not to be regarded as a mere implied covenant, but, in a case like this, *where practically the whole consideration must depend upon the implied undertaking, it is to be treated as a condition subsequent.*”

It will be observed that in the foregoing cases, and a multitude of others which might be cited, the courts have gone much farther than is necessary to do in deciding this case. In those cases, the leases were held to be absolutely void, in actions brought to cancel them while in these cases, it is not necessary to pass upon the validity of the leases involved, the question being only as to their enforceability in a court of equity at the instance of the lessee.

It will also be noted that in many of the cases cited, there had been at least a part performance; possession had been taken and money expended by way of development resulting, in most cases, in the finding of oil and gas. The infirmity in such instances was due to the want of an obligation assumed by the lessee to operate the premises whereby the lessor would be made secure in receiving his rents and royalties dependent upon production, while in the cases at bar, there is not only *no promise to perform*, but there has neither been performance nor an offer to perform. And since these leases “fail to bind the lessee to diligent search for oil and gas, *they are without considera-*

tion, binding upon neither party, and voidable at the pleasure of either."

This leads us to another branch of this proposition:

(b) WANT OF MUTUALITY OF ENGAGEMENT

"Contracts, unperformed, optional as to one of the parties, are optional as to both."

The above words are not our own. They are the words of the United States Circuit Court of Appeals, for the Seventh Circuit, in the case of *Federal Oil Company v. Western Oil Company*, 121 Fed. Rep., 674 at bottom of page 677, employed by the court in stating a general and well established rule of law, applicable to every class of contracts, and applied by the court in this instance to an oil and gas lease under which a prior lessee was seeking to enjoin a subsequent lessee, as in these cases, from operating upon the demised premises.

It is elementary that mutuality of engagement is essential, not only to the *enforceability* of a contract, but also to its *validity*. Professor Clark, in his work on contracts, at page 165, states the rule in these words:

"A promise is a sufficient consideration for a promise, if the act or forbearance promised would be a consideration. The promises must be concurrent. The promise may be contingent or conditional, except that mutuality of engagement is necessary, and, if the condition or contingency produces want of mutuality, the consideration is insufficient. Both parties must be bound, or neither is bound."

It might be added that the promise of one party is sufficient consideration for the present delivery of a thing of value, or the present granting of a valuable right or privilege to the other

party. But where a promise is the consideration of a contract, that promise must be such as is capable of enforcement by the one to whom it is made. A promise to do an impossible thing, or to do an unlawful thing, or to do a thing which the party making the promise is already bound to do, or a promise to do a thing, which, under the terms of the contract, the party making the promise may avoid doing by surrender or otherwise, is *nudum pactum*, and will not support a contract. In other words, where a promise is the consideration of a contract, it must be within the power of the party in whose favor the promise is made, to compel performance of that promise; and if not, the contract is void for want of consideration and for want of mutuality.

These principles are universal and have often been applied to oil and gas leases as well as to other classes of contracts.

In the case of *Huggins v. Daley*, 99 Fed. Rep., 606, 40 C. C. A., 12, 48 L. R. A., 320, the court quotes with approval from the case of *Oil Co. v. Fretts*, 152 Pa., 451, this language:

"He could not be compelled to put down another well, and he not being bound, the lessor was not bound either; for the only consideration left to him was the prospective oil royalties and gas rentals which the lessee was in a position to defeat. *Contracts, unperformed, optional as to one of the parties, are optional as to both.*"

Continuing, the court says:

"While most of the cases cited have gone on the ground of abandonment, the governing principle in all oil leases of the character under consideration is that *discovery and production* of oil is a condition precedent to the continuance or vesting of any estate in the demised premises; that such lease vests no present title in the lessee, and if, *at any time, the lessee has the option to suspend operations,*

the lease is no longer binding on the lessor for want of mutuality; and where the only consideration is the prospective royalties to come from exploration and development, failure to explore and develop renders the agreement a mere nudum pactum and works a forfeiture of the lease, for it is of the very essence of the contract that work should be done."

In the case of *Steelsmith v. Gartlan*, 45 W. Va., 27, 44 L. R. A., 107, the Supreme Court of West Virginia says:

"He (the lessee) could not, as he himself maintains, be compelled to put down another well; and he not being bound, the lessor was not bound either, for the only consideration left to her was the prospective oil royalties and gas rentals which the lessee was in a position to entirely defeat. *Contracts, unperformed, optional as to one of the parties, are optional as to both.*"

In the case of *Eclipse Oil Co. v. South Penn Oil Co.*, 47 W. Va., 84, 34 S. E. Rep., 923, 20 Mor. Min. Rep., 234, in stating the general proposition said:

"A consideration mentioned which is not legally enforceable is equivalent to no consideration, and a contract dependent thereon is as much *nudum pactum* as if no consideration was named.

"Where two parties to an instrument enter into mutual covenants which are interchangeable considerations for each other, if either party neglects or refuses to bind himself, *he thus renders the instrument void for want of mutuality, and he cannot avail himself of it as obligatory upon the other by any subsequent act of his own, without the latter's consent.*—*Dodge v. Hopkins*, 14 Wis. 630."

In the case of *Natural Oil and Pipe Line Co. v. Teel* 67 S.

W. Rep., 545, the Court of Civil Appeals of Texas, applied this rule to an oil and gas lease. In the opinion holding such a lease void for want of mutuality, the court said:

"The absolute control the contracts gave him in respect to performance of the conditions subsequent, and the absence of any right of the vender to insist on performance, render the same objectionable for want of mutuality. The work was not begun, hence, no equities exist in favor of the appellants. They were not bound to perform, and could abandon the matter at any time. *Under these circumstances, the appellees were also not bound, and they have a right to annul the contract.*"

In Donahue in his work on "*Petroleum and Gas*," at page 155, the author states the rule supported by authorities, thus:

"Where an oil and gas lease fails to bind the lessee to prosecute the work diligently, and the consideration for the lease is a part of the oil and gas produced, *the lease is void for want of mutuality.*—*Foster v. Elk Fork Oil and Gas Co.*, 90 Fed. Rep., 178.

"So where the lessee has a right to surrender the lease at any time and be released from all liabilities under the lease, the lease is void for want of mutuality, when the consideration for the lease is a part of the product, hence, *the lessor may revoke the lease at any time before the lessee commences operation on the land for the production of oil or gas.*—*Eclipse Oil C. v. South Penn Oil Co.*, 47 W. Va., 84, 34 S. E. Rep., 923."

"So a lease giving the lessor a part of the oil produced as a consideration for the lease, and so much a well for gas, and, in case no well is sunk, the lease to be null and void, unless the lessee pay a certain sum in advance for each quarter, the lease is but an option and does not bind the

lessee to pay any sum, and may be avoided by either party.—*Snodgrass v. South Penn Oil Co.*, 47 W. Va., 509, 35 S. E. Rep., 820."

"Since the lease which does not bind the lessee to do anything and permits the lessee to surrender the lease at any time, such a lease confers no right on the lessee, other than a mere right to commence operations, so the death of the person who executed the lease will put an end to the right of the lessee to enter.—*Trees v. Eclipse Oil Co.*, 47 W. Va., 107, 34 S. E. Rep., 933."

"A lease, by which the lessee may postpone operations on the payment of a small sum of money, will not be upheld in equity, especially if the lessee led the lessor to believe that operations would begin in a short time after the execution of the lease, since leases so drawn are regarded as options.—*Eclipse Oil Co. v. South Penn Oil Co.*, 47 W. Va., 84, 34 S. E. Rep., 923."

In the case last cited the lease was given for a term of three years and contained a definite promise to pay a stipulated sum for failure to construct a well within a specified time. It reserved, however, the right to surrender at any time in language very similar to that employed in the leases in this case. Nothing had been done on the premises after the execution of the lease, although the "rentals" were paid. The validity of the lease was the point to be determined by the court, and in opinion holding the lease void, this language was used:

"The effect of the last clause of the controverted lease appears to have been overlooked by counsel. It is in these words: 'And it is further agreed that the second party, their heirs or assigns shall have the right at any time to surrender this lease and be released from all money due and conditions unfulfilled; then and from that time, this

lease and agreement shall be null and void, and no longer binding on either party, etc.' This clause apparently destroys this lease, or renders it invalid, at least until some consideration has passed from the lessee to the lessor. Lessee's counsel claim that he was not bound to do anything or pay anything until 18 months from the date of the lease, and in the meantime he has the right to surrender it, and, thereby be released entirely from any obligation whatsoever. This renders it to this extent, *nudum pactum* by which the lessor is not bound any more than the lessee; and until something is done in consummation thereof, either party may terminate it. *If one party may terminate an estate at his will, so may the other. Right to terminate is mutual.*"

In the case of *Reece v. Zinn*, 103 Fed. Rep., 97, the court in holding a lease of this kind absolutely void, said:

"The lease is void for want of mutuality, for the reason that it puts it within the power of the lessee to terminate the lease at will and *thereby confers the same power on the lessor.*"

In Illinois, as in most other jurisdictions, the rule has often been applied.

In the case of *Vogle v. Peakoc*, 157 Ill., 339, 24 N. E. Rep., 386, the court said:

"Here the contract implies no obligation on one of the parties, hence it is void for want of mutuality. The contract being void, it will not be necessary to inquire whether the amount which it was provided might be retained, was penalty or liquidated damages."

We also invite the attention of the court to the somewhat recent case of *Baur v. Lumaghi Coal Co.*, 209 Ill., 316, 70 N. E. Rep., 634. In the opinion the court said:

"One can not read the contract in this case without being impressed with the fact that it was so worded that if, in the future, the coal business should prove profitable, and Rupperecht or his assigns could gain an advantage by taking the easement, then they would have a right to demand it, and could compel Baur to convey; but if the coal business did not open up favorably and it would be no advantage to Rupperecht, then Baur would have no right to compel a specific performance and would be powerless to force Rupperecht to do anything. It was therefore lacking in the element of mutuality required under the decisions above quoted, *and therefore could not be specifically enforced in a court of equity.*"

Let us therefore, test the contracts which the complainants are seeking to enforce in this action, by the above well established rules.

By these contracts, the first parties "granted, demised, leased and let unto the party of the second part," certain tracts of land in Crawford County, Illinois, "for the sole and only purpose of mining and operating for oil and gas, and of laying pipe lines, and of building tanks, stations and structures thereon to take care of said products." This was the consideration moving *from the first parties*. What are they to receive for this demise,—for the granting of these valuable rights and privileges? Do these contracts give to them the thing bargained for? Can they go into court and secure the thing promised as a consideration for this "grant and demise?" The contracts recite that this demise is made "for and in consideration of one dollar and the covenants and agreements hereinafter contained on the part of said party of the second part to be paid, kept and performed." What are these "covenants and agreements?" Let us see. The contracts say:

"IN CONSIDERATION OF THE PREMISES, The

said party of the second part covenants and agrees: "1st. To deliver to the credit of the first party etc., the equal one-eighth part of all oil produced and saved from the leased premises; and, 2nd, to pay \$100 per year for the gas from each and every gas well drilled on said premises, the product of which is marketed and used off the premises, said payment to be made on each well within sixty days after commencing to use gas therefrom, and to be paid yearly thereafter while the gas from said well is so used."

Is there here any promise to do anything or to pay anything? Under what conditions are the first parties to receive their oil royalty or gas rental, which constitute the consideration for this grant? Is there any promise to "*drill*" a well or to "*produce*" or "*save*" any oil or to "*market*" or "*use*" any gas, upon which the consideration depends, and in fulfillment of the express purpose for which the lease was given? When, if ever, would there be a default upon the part of the second party for which an action would lie, either for specific performance or for damages?

The leases further provide:

"Second party covenants and agrees to locate all wells so as to interfere as little as possible with the cultivated portion of the farm." Mark the language: "*All wells!*" What wells are to be so located? Is there any promise to "*locate*" any well or wells upon the premises? Not unless that promise is contained in the words immediately following: "*And, further, to complete a well within nine months from the date hereof,*"—Is there at last a promise to drill a well? Has the second party at last bound himself to do at least something in keeping with the purpose of the lease? Let us look again. Upon further examination it will be found that this is not a promise to complete a well, but it is an alternative promise "*to complete a well within nine months from the date hereof or pay at the*

rate of 25 cents per year, quarterly in advance, for each additional three months such completion is delayed!"

Thus it turns out that all this excitement about "*mining and operating for oil and gas*;" the laying of "*pipe lines, and building tanks, stations and structures to take care of said product*;" the delivering of "*the equal one-eighth part of all oil produced and saved*;" the paying of "*one hundred dollars per year for the gas from each and every well drilled on the leased premises*;" the locating of "*all wells so as to interfere as little as possible with the cultivated portion of the farm*," and the completing "*a well on said premises within nine months from the date hereof*," was a false alarm. Instead of promises, they are mere pretenses. There is not a promise in the entire instrument to do any of these things,—not one! So far as the leases are concerned, they are not "*for the sole and only purpose of mining and operating for oil and gas*," because there is no promise whatever, in the instruments, to do any of these things. What, then, is the consideration which induced Susannah Smith and James A. Smith to execute these instruments whereby they are deprived, not only of the right to operate upon their own premises for oil and gas for a period of five years, or of procuring some one else to do so but have parted with and conveyed to M. A. Walton and his assigns, to be bartered and sold and speculated upon, the prospective enhancement of the value of their premises by the finding of oil or gas in that vicinity, for that period of time?

What do the complainants say,—what can they say,—they are required to yield in return for this demise, the granting of these privileges, the parting with such valuable rights and the prospective handsome returns from the discovery and production of oil and gas? We have seen that the leases contain no covenant, promise or agreement to do anything. The consideration, therefore, dependent upon development of the prem-

ises and the production of oil and gas,—*the very purpose for which these leases were given*,—is out of this case.

The only remaining obligation, then, to support, these leases must be the promise to pay 25 cents a year for the failure to complete a well after the expiration of nine months. Is such a contention tenable? To so hold would be to give to the leases a meaning directly contrary to that expressed in the instruments themselves. The leases recite that they were given "for the sole and only purpose of *mining and operating* for oil and gas." While, if it be held that these prospective money payments were the inducement which inspired this transaction, then it must be said that they were given for the "sole and only purpose," of *preventing* the mining and operating for oil and gas, because these payments are to be made only for delay, —while the premises are held dormant! And the entire instrument will be searched in vain to find any obligation assumed by the complainants except the making of these payments, and even that, as we shall presently see, may be avoided under the surrender clause.

Unless we misinterpret the position of the petitioners in this respect, it is their contention that the leases in question were not given for the purpose of development and production, but for the purpose of preventing operation on these lands in competition with such operation on adjacent lands. This position, however, is not tenable for many reasons. Whatever may have been the secret purpose or intent of M. A. Walton and his assigns, in this respect, these leases, upon their face, show that they were not given for any such purpose. They were given "for the sole and only purpose of *mining and operating* for oil and gas," and not for the purpose of *preventing* such operation. As was said by the court in the case of *Federal Oil Co. v. Western Oil Co.*, 121 Fed. Rep., 674, at pages 676-7:

"It is undoubtedly true, as urged by the appellant,

with respect to enterprises of this character, that a company proposing to obtain natural gas or oil in large quantities for sale or manufacturing purposes, finds it desirable to acquire exclusive right to search for the fugitive minerals in a large area or areas; and, though it be not necessary for the proper development of the particular area to drill a well upon the land of all the several proprietors within the district, it is desirable and profitable to have no competing wells on the territory. That, however, was not the purpose of this contract."

It is no doubt true that a contract of the kind suggested, if honestly made, would be upheld. For a proper consideration, a land owner may forego the benefits he would receive from development and production, and the lessee may obtain whatever advantage it might be to him to be relieved from competing wells on the premises. But in such case, that must be the basis upon which the contract is made. The consideration, in such case, would be commensurate with the rents and royalties which the land owner would lose, and commensurate with the benefits the lessee would gain by holding the premises dormant. In such case, the lease would recite the purpose for which it is given, and not recite that it is given "for the sole and only purpose of *mining and operating* for oil and gas," when that, in fact, was not its purpose.

In such case, if the transaction be an honest one, the consideration for the grant would not be "the one-eighth part of all oil produced and saved from the leased premises to be delivered free of cost in pipe line to which second party may connect its wells," and "One Hundred Dollars per year for the gas from each and every gas well drilled on said premises, the product of which is marketed and used off the premises." Such a recital in the lease would be nonsense if not dishonest, if there was in fact, to be no well completed, and no oil or gas produced. Nor would the consideration be 25 cents a year,

nor 25 dollars a year, if the land owner is to be deprived of all benefits he would receive from the production of oil and gas, but would be an amount commensurate with the value of the income he would receive from such production.

A lease may not be obtained for one purpose, for a consideration consistent with that purpose, and then converted into a lease for an entirely different purpose, whereby the lessor is deprived of the consideration for which it was given. This would be a fraud of the rankest type, and, unless we mistake the meaning and purpose of the Petitioners it is such a fraud that the court is asked to perpetrate upon the respondents in this case.

Because of the want of any other obligation assumed, the petitioners are forced to contend that these money payments were the real inducement which led to the execution of these instruments, or admit the alternative that they are without consideration and lack mutuality of engagement. But will such a contention be entertained for a single moment? Can it be argued with any show of reason that for the mere sum of \$1, Susannah Smith or James A. Smith sold the prospective advantages they would receive by the discovery of oil or gas in their neighborhood for a period of nine months, and that for the mere pittance of 25 cents a year, deprived themselves of such benefits for an additional term of four years and three months?

But, for the sake of the argument, let us concede, for the present, the contention of the petitioners in this respect. They insist that because of the promise to make these money payments, these contracts are binding upon the first parties for a period of five years, and ask this court to so hold. If the first parties are so bound, it is because the second party can be compelled to supply the consideration for which they so bound themselves. If not, then it is not a five year contract. A contract implies mutual obligation, and when it ceases to bind one

of the parties, then it ceases to be a contract and binds no one. To measure the duration of these contracts; therefore, it is necessary only to determine when and where mutuality ceased. And if it should turn out that this promise, like all the other apparent promises, is subject to the will of the lessee then, indeed, do the leases lack consideration and mutuality.

The leases recite that at the time of their execution, one dollar was paid. The remainder of the consideration was the covenants. Nine months were given in which to make the preliminary test—to complete a well. For this probationary period, both parties were bound, one by the payment of the dollar, and the other by the terms of the lease itself. During this period, neither party could rescind in so far as there had been performance. That is to say, the dollar paid could not be recovered. While a court of equity, perhaps, during this period, would have refused to enforce these leases because inequitable, there being no means by which to compel the rendering of the real consideration, still, having paid a consideration, though nominal, for the right to make the development contemplated within the nine months, a court would probably refuse to cancel them during that time in actions brought for that purpose. But in order to extend that right beyond this probationary period, no possession having been taken, or development made, hence, no rights vested, it was necessary to supply the additional consideration. This the first parties had no power to enforce. No court could have compelled operation on the premises, nor the payment of the six and one-fourth cents for an additional three months period, except at the election of the second party. In other words, it was within the power of the second party to terminate these contracts at the end of nine months by surrendering the leases. Here, then, mutuality of engagement ended, because further performance by the second party could not be enforced; the contracts being *unperformed*, and being *optional as to one of the parties*, they were *optional as to both*.

This leads to another branch of this subject.

(c) WANT OF MUTUALITY OF REMEDY

"A court of equity never interferes where the power of revocation exists."

The lease contains this clause:

"It is agreed that the second party is to have the privilege * * * at any time to remove all machinery and fixtures placed on said premises; and, further, upon the payment of \$1, at any time, by the party of the second part, heirs, successors or assigns, shall have the right to surrender this lease for cancellation, after which all payments and liabilities thereafter to accrue under and by virtue of its terms, shall cease and determine, and this lease become absolutely null and void."

Oil and gas contracts containing provisions of this character have frequently been before the courts. And while in some instances, where there had been performance, the courts have refused to cancel them in actions brought for that purpose *by the lessor*, it is also true that until this case was decided in the trial court below, *no court has ever yet enforced such a contract*, either by decreeing its specific performance or by enjoining its breach or in any manner at the instance of one in whose favor the right of revocation is reserved. Most courts have unhesitatingly declared them absolutely void.

While the tendency has been to look upon "oil contracts" with suspicion and to scrutinize their every provision with scrupulous care, and to construe them most strictly against the lessee, as shown by the authorities previously cited and quoted from, the rule for which we are now contending has been many times applied with much vigor to other kinds of contracts, both where relief by specific performance and by injunction was asked.

We will first call attention of the court to a few cases in

which the courts have applied the rule to contracts other than oil leases.

In the case of *Southern Express Co. v. The Western N. C. R. R. Co.*, 99 U. S., 191, 25 Law Ed., 319, the above rule was applied in a most summary manner as we have seen by a quotation from this case under a previous topic in this argument.

In the case of *Iron Age Publishing Co. v. Western Union Tel. Co.*, 83 Ala., 498, 3 South Rep., 449, 3 Am., St. Rep., 759, where the complainant sought to enjoin a breach of a contract determinable at will, the court said:

"We can tie the hands of the Associated Press and the other defendants by injunction, forbidding the delivery of the press dispatches to any one else than the complainant, as prayed for, and leave the complainant free to terminate the contracts at its will without limitation of time or circumstances, or to perform its duties as correspondent as negligently or diligently as discretion may dictate. * * * The first decree suggested would be entirely opposed to all equity precedents and practice; the settled rule being that the courts will not interfere by injunction in cases of this kind, if, indeed, in any case, where the defendant can not be made secure in his rights and remedies for violation of duties imposed on the complainant by the contract sought to be enforced. *Bromley v. Jeffries*, 2 Vern., 415; *Richmond v. Dubuque, etc. R. R. Co.*, 33 Iowa, 422, and cases cited on page 486."

In the case of *Rutland Marble Company v. Ripley*, 10 Wall., (U. S.) 339, 359; 19 Law Ed., 955, 961, the principle applicable to this question is stated by Mr. Justice Field as shown by the paragraphs quoted from this case under a topic previously discussed in this argument.

In the case of *Rust v. Conrad*, 47 Mich., 499, 41 Am. Rep.,

720, the Supreme Court of Michigan by Judge Cooley, states the rule in such manner as to leave no doubt as to its correctness:

"The contract was not one which a court of equity will enforce. By its terms, the lease to be given under it might, at any time, be terminated by the lessee as to the whole land or any part of it not less than eighty acres, on their giving thirty days' notice of intention to do so. The continuance of the lease, if one should be given, would therefore depend on the will of the lessee, who might immediately terminate it. The contract, therefore, lacks mutuality and equality; and not being mutual or equal, lacks equity, and for that reason should not be enforced."

And further:

"But the court will also refuse to interfere in any case, where if it were to do so, one of the parties might nullify its action through an exercise of a discretion which the contract or the law invests him with. The refusal, in such case, does not depend, of necessity, upon any illegality, inequality or unfairness, but it is sufficiently based upon the impropriety of imposing on the judge the labor, and on the public the expense of an investigation of disputes, when the circumstances are such as to preclude any judgment that may be rendered from being final. *No court can, with reason, be called upon to do a vain thing.*"

In the case of *Fowler Utilities Co. v. Gray*, 168 Ind., 1, 79 N. E. Rep., 897, will be found an exhaustive discussion of this subject of negatively enforcing a contract, determinable at the will of the complainant, by enjoining its breach. In the opinion the court says:

"The general rule is that an injunction will not be granted to restrain a breach of contract by a defendant when the complainant's promises are of such a nature that

they could not be specifically enforced, unless they have been already performed. 22 Cyc. 850. This rule is founded upon a want of mutuality. The term, 'contract,' implies mutual obligation, and, in general, contracts, other than options, are not enforceable unless both parties there-to are bound, so that an action could be maintained by each against the other, for a breach." (*Citing authorities.*)

In the case of *Alworth v. Seymore*, 44 N. W., 1030, (Minn.) the court announced the same rule in these words:

"And specific performance will not be decreed unless the court can, at the time, enforce the contract on both sides, so that the whole agreement will be carried into effect according to its terms. If this can not be judicially secured on both sides, it ought not be compelled on one side and the other left at liberty to perform or not, or to perform in such a way as suits his own interest. Fry Spec. Per. Sec. 440; Pom. Eq. Jur. Sec. 1405 and notes; Pom. Spec. Per. Sec. 165, 166."

In the case of *Welty v. Jacobs*, 171 Ill., 624, 49 N. E. Rep., 728, the rule is announced in a very lucid manner, as applied to the subject of "negatively" enforcing a contract of this kind by enjoining its breach. In course of the opinion, the court said:

"The bill of complaint in this case, though not strictly a bill for the specific performance of a contract, is in substance a bill of that kind. In 3 Pom. Eq. Jur. Sec. 1314, it is said: 'An injunction restraining the breach of a contract is a negative specific enforcement of that contract. The jurisdiction of equity to grant such injunction is substantially coincident with its jurisdiction to compel a specific performance. Both are governed by the same doctrine and rules. It may be stated, as a general proposition, that whenever the contract is one of a class which

will be affirmatively specifically enforced, a court of equity will restrain its breach by injunction, if this is the only practical mode of enforcement which its terms will permit.'

"It is plain that, as a general rule, to enjoin one from doing something in violation of his contract, is an indirect mode of enforcing the affirmative provisions of such contract, although such an injunction may often fall short of accomplishing its object."

The cases of *Chicago, etc., Co. v. Town of Lake*, 130 Ill., 42, 22 N. E. Rep., 616; *Cleveland v. Martin*, 218 Ill., 73, 75 N. E. Rep., 772, and *E. St. L. R. R. Co. v. City of E. St. Louis*, 182 Ill., 433, 55 N. E. Rep., 533, are also injunction cases and are to the same effect.

Some confusion has arisen in relation to the application of this rule because of a failure to distinguish between the impotency due to the nature of the contract itself, and that arising from the subject-matter of the contract. This is glaringly apparent in the Master's report in these cases upon which the decrees were based.

Where, by reason of the nature of the contract, it can not be enforced against one of the parties, the courts will refuse to enforce it against the other, either affirmatively by decreeing its specific performance, or negatively, by enjoining its breach. Where, however, the contract being legal, equitable and mutual, but because of the nature of the subject-matter, the court is unable to enforce it affirmatively by decreeing its specific performance, relief will be granted by enjoining its breach.

The leading case upon this subject is the English case of *Lumley v. Wagner*, 1 De Gex M. & G., 604. In that case, the defendant made a contract with the plaintiff to sing at his theater, and not to sing at any other, during a certain period. The court did not attempt to enforce the specific performance of the contract, but granted the plaintiff all the relief possible

by enjoining the defendant from singing at any rival theater during the period fixed by the contract. Here the affirmative relief could not be enforced for the reason that the court could not compel the defendant to properly perform, hence, the negative remedy. This feature is illustrated in the case of *De Riva-filoli v. Corsetti*, 25 Am. Dec., 533, in which the chancellor, in a jocular vein, recites the old adage, "A bird that can sing, and will not sing, must be made to sing."

There are many contracts which will be enforced negatively by enjoining their breach which, because of the nature of the subject-matter, could not be enforced by the affirmative remedy. Among these are contracts involving the performance of continuous personal duties, requiring prolonged supervision, and those requiring especial skill, talents, or accomplishments, such as singers, actors, lecturers, artists, skilled mechanics, base ball players, and the like. But before a contract will be enforced by either method, the contract, itself, must be such as to come within the range of equitable principles.

Reverting to the leading case of *Lumley v. Wagner, supra*: If in that case the complainant had failed to assume any obligation enforceable against himself,—had not bound himself to furnish the theater in which the defendant was employed to sing; had not bound himself to pay the defendant for his services or to render any consideration whatever for such services except at his own choice, and had reserved the right to terminate the contract at any time,—would the court have enforced such a contract by granting any relief, at the behest of him who thus was not bound? If he had gone into court basing his demand for equitable relief upon such a contract, and that too, without having done equity by performance or offering to do equity by tendering performance, or offering in his bill to do and perform whatever the court may decree ought to be done on his part, then the case of *Lumley v. Wagner* might have become a leading case, but on quite a different point.

In Merwin on "Equity and Equity Pleading" at page 442, the author states that there are three important classes of cases relating to personal property or personal services in which a court of equity will thus interpose:

"(1) Where the owner of a patent has agreed to give the plaintiff an exclusive license to make or sell the article manufactured under it, equity will enjoin him from so licensing a third person, or from delivering the patented articles to others."

Illustrative of this class, is cited the case of *Singer Sewing Machine Co. v. The Union Buttonhole, etc. Co.*, 1 Holmes 253.

"(2) Where one has contracted not to engage in a particular trade or calling, or in a particular business, within a certain territory, or for a certain period, equity will enjoin a breach of his contract."

Illustrative of this class, is cited McClurg's Appeal, 58 Pa. St., 51, in which a physician was enjoined from violating his contract to not practice his profession within a certain radius.

"(3) Where one has engaged to perform certain services for the plaintiff, and not to enter any competing service, equity will enjoin him from entering such service, although it cannot compel him to perform the services for the plaintiff."

Illustrative of this class, is cited the case of *Lumley v. Wagner, supra*, and in note 2, on page 443, this case is explained and distinguished.

We will now see how the rule has been applied to oil and gas leases.

In the case of *Federal Oil Co. v. Western Oil Co.*, 112 Fed.

Rep., 373, from which we have previously quoted under another branch of this case, the court further says:

"And for a still further reason the court must refuse to enforce this lease. The lease expressly provides that the complainant shall have the right to remove all its property from the demised premises at any time, and may cancel and annul this contract, or any part thereof, at any time. *It is a well settled rule of law that a lease which is determined at the will of one party, is equally determined at the will of the other.*"

"And for a still further reason the court must refuse to enforce this lease. The court will not decree that one party shall specifically perform a contract which the other party, at its option, may refuse to carry out. It is of the essence of a decree that it should be mutually binding and conclusive on both parties. It would be an idle formality for the court to enter a decree against the defendants in this case, for the reason that the complainant has the right to render the decree ineffective at any moment it pleases. *Marble Company v. Ripley*, 10 Wall., 339, Law Ed., 955."

The above case was taken to the Circuit Court of Appeals for the Seventh Circuit, and in affirming the decision of the Circuit Court for the District of Indiana, that court,, in *Federal Oil Co. v. Western Oil Co.*, 121 Fed. Rep., 674, re-asserted the rule in these words:

"The appellant had the right at any time to remove its property and cease operations without respect to the interest of Bradford, and with respect only to its own interest; and it could cancel and annul the contract, or any part thereof, at any time. There was here an entire want of mutuality—an utter absence of obligation on the part of the appellant. *Equity will not specifically enforce a con-*

tract against one party when it can not be specifically enforced against the other. Marble Co. v. Ripley, 10 Wall., 339, 359, 19 Law Ed., 955; *Kerrick v. Hannaman*, 168 U. S., 328, 336, 18 Sup. Court, 135, 42 Law Ed., 484."

Under the preceding branch of this proposition are many "oil cases" cited in which this rule was many times applied and to which we invite attention without repeating them here.

THE RULE IN ILLINOIS.

The first expression of the Supreme Court of Illinois on this subject in relation to an oil and gas lease, was in the case of *Watford Oil and Gas Company v. Shipman, et al.*, 233 Ill., 9, 84 N. E. Rep., 53, in which it was held that a lease of the character of these here in controversy, is not enforceable in a court of equity *at the instance of the lessee*.

On the same day, February 20, 1908, in the case of *Poe v. Ulry*, 233 Ill., 56, 84 N. E., 46, the same court refused to cancel a lease of this character in a suit brought for that purpose *by the lessor*.

Later, in the case of *Cortelyou v. Barnsdall*, 236 Ill., 138, 86, N. E. Rep., 209, the court did cancel a lease of this character in an action brought for that purpose *by the lessor*.

Still later, in the case of *Ulry v. Keith*, 237 Ill., 284, 86 N. E. Rep., 696, the same court refused to enforce a lease of this character in an action *brought by the lessee*.

At first blush, it would seem that there is a sharp conflict among these decisions, especially so between the Poe-Ulry case and the Cortelyou-Barnsdall case. But this apparent conflict vanishes when the question of *vested rights* is considered. The distinction between these cases rests upon the well established rule that a lease of this character vests in the lessee no present title or estate either in the soil or in the oil and gas in place;

that title to the oil and gas is inchoate and contingent upon being found; that the finding of oil or gas is a condition precedent to the vesting of any title, but, *when found*, the right to produce becomes a *vested right*.

In the Cortelyou-Barnsdall case, no possession had been taken and the lease was held to be a mere license or option which could be revoked at any time before something was done, binding the lessee to exercise the option; while in the Poe-Ulry case, the inchoate estate had become absolute by performance resulting in the finding of gas, and the right to produce thus became a vested right, of which the lessee could not be divested *at the instance of the lessor*.

In the Watford case and the Ulry-Keith case, the lessees were the complainants. They, *as actors*, went into a court of equity asking affirmative relief, basing their demand upon the leases which they held. In the Watford case no possession had been taken of the premises, and in the Ulry-Keith case, gas had been found and the terms of the lease complied with. In each case, the court refused to grant the relief sought, because the lease was inequitable in that it lacked mutuality.

Construing these cases together, the rule in Illinois seems to be:

1. *Where the lessee has acquired no vested estate by performance, a lease of this kind will be cancelled in an action brought for that purpose by the lessor.—Cortelyou v. Barnsdall, supra.*

2. *Where the lessee has acquired a vested estate by performance, the lease will not be cancelled in an action brought for that purpose by the lessor.—Poe v. Ulry, supra.*

3. *Leases of this character will not be enforced in a court of equity at the instance of one not bound by its provisions, no matter whether there has or has not been performance, but the court will leave the parties where it found them.—Watford Oil Co. v. Shipman, supra, Ulry v. Keith, supra.*

PROPOSITION VI.*No Tender of Performance.*

The petitioners should not recover in this action for the reason that they have neither done equity by performing nor by tendering performance of the optional provisions of the leases, nor in their bill do they offer to do equity by offering to perform whatever the court may decree ought to be done on their part.

It will not be necessary to multiply words, nor to cite numerous authorities to sustain this proposition. In the case of *Federal Oil Co. v. Western Oil Co.*, 121 Fed. Rep., 674, at page 677, the court states the rule in these words:

"Equity will not specifically enforce a contract against one party when it can not be specifically enforced against the other. *Marble Co. v. Ripley*, 10 Wall., 339, 359, 19 Law Ed., 484. Not only could this contract be not enforced against the appellanat, for want of obligation assumed, but it does not offer by its bill to do that which was the obvious intent of the contract it should do, namely, to drill a well for oil and gas. Tender of performance is absolutely necessary, especially in cases of optional contracts. *Kelsey v. Crowther*, 162 U. S., 404, 16 Sup. Ct., 808, 40 Law Ed., 1017; *Richards v. Green*, 23 N. J. Eq., 536."

In Story's Equity Jurisprudence, Sec. 736, on this subject, it is said:

"In cases of covenants and other contracts, where specific performance is sought, it is often material to consider how far the reciprocal obligations of the party, seeking relief, have been fairly and fully performed. For if the latter have been disregarded, or they are incapable

of being substantially performed on the part of the party seeking relief, • • • courts of equity will not interfere."

In Pomroy on Specific Performance, Sec. 330, it is said:

"The party seeking aid in a court *as an actor*,—generally the plaintiff,—must not only show that he has complied with the terms, so far as they can and ought to be complied with, at the commencement of the suit; he must also show that he is able, ready and willing to do those other future acts which the contract stipulates for as a part of its specific performance."

In the case of *Chicago Mun. Gas and Light Co. v. Town of Lake*, 130 Ill., 42, on page 60, in an injunction case, the court said:

"One of the principles which govern, where a bill for specific performance is brought, is, that the complainant must show that the contract has been fully and fairly, and in good faith, performed."

While the complainants have filed in this case what they denominate a "stipulation," in which they say that if given this property in its improved condition, they will not avail themselves of the "surrender clause" by surrendering the property, they do not offer to do equity by carryiny out the spirit, purpose and intent of the contract by performing that which was their duty to do, but which they did not bind themselves to do, and have wholly failed to do. At most they simply say that they will hold fast to all which is thus given them. This "stipulation" is to say the least, an innovation, and without further considering its merits at this time, we submit that it does not satisfy nor avoid the rule stated in this proposition.

Not having done equity by performing that which was their plain duty to do; and not having offered to do equity by

tendering performance, but being in these respects wholly in default, and not having offered in their bill to do and perform whatever the court may decree should be done on their part, the complainants are not in a position to invoke the aid of equity.

PROPOSITION VII.

Condition Precedent

The completion of a well upon the demised premises within the time stipulated (nine months) was a condition precedent to the vesting of any estate. And at the expiration of the time given in which to make the preliminary test, none having been made, the lessor had a right to avoid the lease by leasing to another.

The lease in controversy conveyed no estate to the petitioners, but was a mere option to be accepted by the lessee within nine months. The completion of the well within the time specified was a *condition precedent* to the vesting of any estate, and after the expiration of that time, no well having been completed upon the premises, the lessor was at liberty to lease the land to another.

Technical words are not necessary to raise a condition. Indeed, a condition will be implied from the nature and subject-matter of the contract,—from the purpose of its execution and object to be attained. In this case, by the lease in question, the lessee acquired no title either to the land, or to the oil and gas, but merely a license to go upon the premises for the purpose of exploration. Nine months were given in which to make a test of the premises. If such test would result in the finding of oil or gas, then an estate would vest in the lessee for the purpose of production. *The testing provided for was a condition precedent to the vesting of any estate*, and if oil or gas were found, the production thereof would be a con-

dition precedent to the continuance of the estate acquired by the finding of oil or gas. The authorities are numerous and conclusive upon this subject.

In the case of *Parish Fork Oil Co. v. Bridgewater Gas Co.*, 51 W. Va., 583, 59 L. R. A., 566, the lessee constructed a well upon the premises, and then ceased operation, relying upon his "vested estate" to enable him to hold the premises for the purpose of speculation. But the court held that while the finding of oil and gas was a condition precedent to the vesting of any estate, the production of these substances was a condition precedent to the continuance of the estate so acquired. In the opinion the court used the following language:

"Until oil is discovered in paying quantities, the lessee acquires no title under such lease. It simply gives a right of exploration. *Steelsmith v. Gartlan*, 45 W. Va., 27, 29 S. E. Rep., 987, 44 L. R. A., 107; *Oil Co. v. Fretts*, 152 Pa. 451, 25 Atl. Rep., 855; *Crawford v. Ritchie*, 43 W. Va., 252, 27 S. E. Rep., 220.

"After the discovery of oil in paying quantities, it is held that title does vest in the lessee, but there is no case which goes so far as to announce that after mere discovery of oil the lessee, upon the assumption of a vested interest or title, may cease operation, refuse to develop the property, tie up the oil by his lease, and simply hold it for speculative purposes or to await his own pleasure as to the time of development.

"A well settled principle of law is that a contract shall be construed as a whole, and in the light of the purposes and objects for the accomplishment of which it was made. Oil leases are no exception to the rule, and, as the subject-matter of the lease is peculiar in its nature, the courts have given this principle great latitude in their construction. They are executed by the lessor in the hope

and with an express or implied condition that the land shall be developed and oil produced. When production takes place, the lease is mutually beneficial.

"The royalty which it is stipulated in all these leases that the land owner shall receive, is generally the moving cause of the execution of the lease. If there is one principle that is asserted in *Steelsmith v. Gartlan* more vigorously and with more emphasis than any other, it is that the lessee shall proceed to make the lease profitable to both parties, and that he shall not be permitted to tie up the land. *The 'testing' provided for was manifestly a condition upon which the lease depended.* If such test showed no minerals, then the contract was at an end; if it, on the other hand, showed the presence of valuable mines, then the lessees were bound to operate them in good faith for the joint profit of themselves and the owners of the fee.

"*Technical words are unnecessary to raise a condition.* If a fair and reasonable construction of the instrument shows that a lease shall depend upon the doing or not doing something essential to the purposes of the contract, *the law implies the conditions.*"—*Petroleum Co. v. Coal, Coke & Mfg. Co.*, 89 Tenn., 381, 18 S. W. Rep., 65."

"It would be unjust and unreasonable, and contravene the nature and spirit of the lease, to allow the lessee to continue to hold his term, a considerable length of time, without making any effort at all to mine for gold or other metals. Such a construction of the rights of the parties would enable him to prevent the lessor from getting his tolls under the express covenant to pay the same, and deprive him of all opportunity to work the mine himself or permit others to do so. The law does not tolerate such practical absurdity, nor will it permit a possibility of such injustice."—*Conrad v. Morehead*, 89 N. C., 31."

"Forfeiture for non-development or delay is essen-

tial to private and public interest in relation to the use and alienation of property. In general, equity abhors a forfeiture, but not where it works equity and protects a land owner from the *laches* of a lessee, whose lease is of no value till developed.'—*Munroe v. Armstrong*, 96 Pa., 307."

" 'A land owner is entitled to his royalty as promptly as it can be had. The danger of drainage from his small holdings is increased by delay, and the resulting damage, not being susceptible of pecuniary measurement, is therefore not compensable. No such lease should be so construed as to enable the lessee, who has paid no consideration, to hold it merely for speculative purposes, without doing what he stipulated to do, and what was clearly in the contemplation of the lessor when he entered into the agreement.'—*Huggins v. Daley*, 99 Fed. Rep., 606, 48 L. R. A., 320."

" 'If a farm is leased for farming purposes, the lessee to deliver to the lessor a share of the crops in the nature of rent, it would be absurd to say, because there was no express engagement to farm, that the lessee was under no obligation to cultivate the land. An engagement to farm in a proper manner and to a reasonable extent is necessarily implied. The clear purpose of the parties to this lease was to have the land developed, and the half yearly payments and the other sums stipulated were intended not only to spur the operator, but to compensate Ray for the operator's delay or default.'—*Ray v. Gas Co.*, 138 Pa., 576, 20 Atl. Rep., 1065, 12 L. R. A., 290, 21 Am. St. Fed., 922."

" 'If oil is found, then the right to produce becomes a vested right, and the lessee will be protected in exercising it in accordance with the terms and conditions of the contract.—*Crawford v. Ritchey*, 43 W. Va., 252, 27 S. E. Rep., 220."

"All the provisions of the contract must be effective, if possible. By its terms this lease is to be in force for the period of fifteen years from its date, and as much longer as the premises are operated for oil or gas. Another provision is that the lessor shall have one-eighth of the oil produced and \$50 per annum for each gas well. It is just as important to the lessor that, when discovery of oil is made, the land shall yield him his royalty as it is that discovery shall vest in the lessee title to the balance of the oil. If the lessee shall be permitted to sit down, and refuse to produce, after discovery, the lessor loses a part of what he contracted for. The contract bears no such construction as that. What the lessee acquired by discovery was the right to produce and take the oil, paying out of it the stipulated royalty, and not title to the oil as it remains in the land without production. Hence this provision that, when a well is completed on the premises, all cash rentals shall cease, must be taken to mean that such cash rental shall cease only when a producing well is completed and operated on the premises, or that the completion of a non-producing well extinguishes the obligation to pay rent, and places it within the principle announced in *Steelsmith v. Gartlan*."

In the case of *Federal Oil Co. v. Western Oil Co.*, *supra*, Judge Baker used this language:

"Oil leases stand on quite different grounds from leases of other immovable property. The governing principle in gas and oil leases of the character in question is that *discovery and production of gas or oil is a condition precedent to the existence and continuance of any vested estate in the demised premises*. Where, as in this case, the only consideration is prospective royalties to arise from exploration and development, failure to promptly explore and develop the demised premises renders the agreement

nudum pactum, and works a forfeiture of the lease, for it is of the essence of such a lease that the work of exploration shall be commenced and prosecuted with promptness."

In the case of *Steelsmith v. Gartlan*, *supra*, the Supreme Court of West Virginia used this language:

"A vested title can not ordinarily be lost by abandonment in a less time than that fixed by the statute of limitations, unless there is satisfactory proof of an intention to abandon. An oil lease stands on quite different grounds. The title is inchoate, and for the purpose of exploration only, until oil is found. If it is not found, no estate vests in the lessee, and his title, whatever it is, ends when the unsuccessful search is abandoned."

Again, in the same case, the court says:

"When a lease provides the mode, manner and character of search to be made, implications in regard thereto are excluded as repugnant. And the demise for the purpose of operating for oil and gas for the period of five years is dependent upon the discovery of oil and gas in the search provided for, and, if such search is unsuccessful, the demise fails therewith, as such discovery is a condition precedent to the continuance or vesting of the demise. The lessee's title being inchoate and contingent, both as to the five years' limit and time thereafter, on the finding of oil and gas in paying quantities, did not become vested by reason of his putting down a non-productive well."

In the case of *Huggins v. Daley*, *supra*, Judge Brawley of the U. S. Circuit Court of Appeals, Fourth Circuit, said: "In cases of conditions precedent, the consideration is the performance of the thing stipulated to be done, not the promise." And further in the opinion he says:

"While most of the cases have gone upon the ground of abandonment, the governing principle in all oil leases of the character under consideration is that the *discovery and production of oil is a condition precedent to the continuance or vesting of any estate in the demised premises*; that such lease vests no present title in the lessee, and if, at any time, the lessee has the option to suspend operations, the lease is no longer binding on the lessor because of a want of mutuality; and where the only consideration is the prospective royalty to come from exploration and development, failure to explore and develop renders the agreement a mere *nudum pactum* and works a forfeiture of the lease, *for it is of the very essence of the contract that work should be done.*"

In concluding the opinion, the court said:

"We are of the opinion, upon the whole case, that the exploration for, and the development of, oil and gas was the sole consideration for this lease; that the provision requiring the boring of a well within ninety days, was a *condition precedent* to the vesting of any interest to the lessee, and that the forfeiture of \$50.00 was intended merely as a penalty to secure the drilling of a well, and, if paid, would have been merely compensation to the land owner for the right of the lessee to possession during the ninety days, and such payment would not be so far a compliance with the conditions of the lease as to vest in the lessee a title in the leased premises for a period of five years; that after the expiration of ninety days from the date of the lease, there being no provision therein for work to be done by the lessee in the development of the property which is the sole consideration therefor, *the lessee had the option to avoid it.*"

In the case of *Foster v. Elk Fork Oil & Gas Co.*, 90 Fed.

Rep., 178, on page 182, the U. S. Circuit Court of Appeals, Fourth Circuit, quotes with approval, the following:

"The demise for the purpose of operating for oil and gas for the period of five years, is dependent on the discovery of oil and gas in the search provided for; and, if such search is unsuccessful, the demise fails therewith, as such discovery is a condition precedent to the continuance or vesting of the demise. The lessee's title being inchoate and contingent, both as to the five year limit and the term thereafter on the finding of oil and gas in paying quantities, did not become vested by reason of his putting down a non-productive well."

If this be true where possession had been taken, work begun and money expended in developing the premises, what can be said of the cases at bar where no hand was raised in carrying out the purpose of the leases?

The case of *Gadbury v. Ohio, etc. Co., supra*, was an action brought by the lessees to cancel a lease after a well had been completed, resulting in the finding of gas in abundant quantities. The lease provided for the completion of a well within forty days from the date of the lease, or in default thereof the payment of \$1.00 a day until a well was completed. It also provided for the payment of \$100 a year for the gas from each well "when marketed off the premises." Upon the completion of the well, it was closed and anchored and no gas was "marketed" off the premises, hence, no payment was made therefor. In the decision of the Supreme Court of Indiana, holding the lease void because of a breach of an implied condition, the court said:

"The grant in question, upon its face, appears to be a mere option to the grantee. Every express undertaking upon his part is subsidiary to the exercise of the option to explore and develop the real estate. The question arises,

however, whether obligations to explore and develop the property may not be implied, and whether such undertakings, if implied, are not such an essential part of the contract as to be treated as conditions. An implied condition may be inseparably annexed to a grant, from its essence and constitution, although no condition be expressed in words.—2 *Blackstone's Comm.* 152; *Petroleum Co. v. Coal Co.*, 89 Tenn., 381.

“In determining whether a condition is to be implied, it is important to note that the substantial consideration which moves a grantor to execute such a grant is the hope of profits or royalties if oil or gas is discovered. Even if the grantee in this case had paid the stated consideration of \$1,—a technically valuable consideration—yet we must construe the instrument with the fact in view that a more substantial reason or reasons prompted the making of the grant.—*Huggins v. Daley*, 99 Fed. 606; *Federal Oil Co. v. Western Oil Co.*, 112 Fed., 373.

“In an ordinary agricultural lease, where the rent is payable in kind, it would, of course, be implied that the tenant would farm the land, and the requirement is implied that lessees in mineral leases, upon royalties, will develop the property if exploration warrants it, where the minerals are stable, although the only result of a delay in operating would be to postpone the receipt of profits or royalties.—*Island Coal Co. v. Combs*, 152 Ind., 379; *McKnight v. Nat. Gas Co.*, 146 Pa. St., 185.

“If a duty to operate is to be implied in such cases, there is much more reason for implication in a grant of the right to operate for oil and gas upon a royalty, owing to the migratory habit of the fluids. ‘Oil leases,’ it was declared in *McKnight v. Natural Gas Co.*, *supra*, ‘must be construed with reference to the known characteristics of the business.’ As said in another Pennsylvania case, ‘The nature of oil and gas, the pressure of the superincumbent

rocks, and the vagrant habit of both fluids under pressure, enter into the contemplation of both parties to such an agreement.'—*Klepner v. Lemon*, 176 Pa. St., 502.

"In grants of the character in question, the title is inchoate, and for the purpose of exploration only, until oil or gas is found in quantities warranting operation; and while the courts manifest a disposition to protect the grantee at this stage, as treating his interest as no longer postponed to the happening of a condition precedent, yet it is thoroughly settled that he can not omit to develop the property and hold the grant for speculative purposes purely.—*Parish Fork Oil Co. v. Bridgewater Gas Co.*, 51 W. Va., 583, 42 S. E., 655; *Blue Stone Coal Co. v. Bell*, 38 W. Va., 297, 18 S. E., 493; *Guffey v. Hukill*, 34 W. Va., 49, 11 S. E., 754, 8 L. R. A., 759, 26 Am. St. Rep., 901; *Ray v. Natural Gas Co.*, 138 Pa. St., 576, 20 Atl., 1065, 12 L. R. A., 290, 21 Am. St. Rep., 922; *Venture Oil Co. v. Fretts*, 152 Pa. St., 451, 25 Atl., 723; *Klepner v. Lemon*, 176 Pa. St., 502, 35 Atl., 109; *Huggins v. Daley*, 99 Fed., 606, 40 C. C. A., 12, 48 L. R. A., 320; *Federal Oil Co. v. Western Oil Co.*, 112 Fed., 373; *Hawkins v. Pepper*, 117 N. C., 407, 23 S. E., 434."

In the case of *Cortelyou v. Barnsdall*, 236 Ill., 138, 86 N. E. Rep., 200, the Supreme Court of Illinois has construed a lease of this character and held it to be a mere license which the lessor may withdraw before the lessee has done some act by which he binds himself to exercise the option.

The respondents most earnestly contend that under the leases in question, the lessee acquired no vested estate either in the soil or in the oil or gas; that the drilling of a well within the nine months given in the lease for that purpose, was a *condition precedent* to the vesting of any title in the lessee; that at the expiration of that period, nothing having been done by the lessee whereby he became bound to carry into effect the

purpose of the leases, the lessors were at liberty to avoid them. And, not having been out of possession of the premises, they could not re-enter upon themselves, but any affirmative act evincing their intention to do so, such as the giving of a new lease, amounted to an election upon the part of the lessors to withdraw the option previously given.

As was said by Judge Brawley of the United States Circuit Court of Appeals, Fourth Circuit, in the case of *Huggins v. Daley*, *supra*:

"In a case like this, no judicial proceeding was necessary to avoid the lease. The landlord, never having been out of possession, can not re-enter upon himself; and it was held in *Guffey v. Hukill*, 34 W. Va., 49, 11 S. E. Rep., 754, 8 L. R. A., 759, and in many other cases, that any unequivocally expressed election to avoid,—as the giving of a new lease,—avoids the one proceeding."

And as was said by the court in the case of *Federal Oil Co. v. Western Oil Co.*, 121 Fed. Rep., 674, at pages 677-8:

"The contract here was determined by the act of Bradford refusing to receive the stipulated sum for further delay, and by placing the Western Oil Company in possession."

PROPOSITION VIII.

Laches

The lease of the complainants should not be enforced in a court of equity because of the **LACHES** of the complainants in that they failed to carry out the purpose of the lease, but stood by awaiting the result of development by others, the fruit of whose enterprise, labor and money, they now seek to appropriate.

The lease was executed on the 22nd day of May, 1905. The lessee promised to complete a well within nine months, or thereafter pay at the rate of 25 cents per year, *quarterly in advance*. The time for making this preliminary test expired on February 22nd, 1906, and during that time no move was made toward carrying out the provisions of the lease. No well was even begun, nor was the penalty paid for failure to complete a well within the time stipulated. To all appearances, the lease was abandoned. After waiting for more than a month from the expiration of this probationary period, with no word from the lessee, and no sign of life upon his part, the land owner executed another lease upon the premises to one H. E. Wilcox, who soon thereafter began the construction of a well upon other land near the premises. This being done, on the 6th day of April, 1906,—although this payment was then long past due,—the complainants deposited in the Exchange Bank of Martinsville, Illinois, the so-called “rental,” said bank being named in the lease as the place of payment.

Afterward, on the 9th day of August, 1906, no possession having been taken under the Walton lease, and there being no indication of any intention ever to do so, and after the Smiths, by letter and in person had made inquiry at said bank and were informed that no money had been left there on account of said leases, and after inquiry by telephone, Mr. C. E. Allison had been informed by said bank that no such payment had been made, said Smiths executed new leases to said Allison on said premises. These leases with another aggregating in all 90 acres, were purchased by respondents, Hennig, Solley and Johnson in March, 1907, for the sum of \$50,000.00, and under these leases, they made valuable and lasting improvements upon the premises, and by the expenditure of vast sums of money in making development, the leaseholds have been made exceedingly valuable.

Neither Hennig nor his associates had any knowledge of

the existence of the Walton leases until they were served with process in these cases from the Circuit Court of Crawford County, Illinois, in which court these cases were originally brought, and at which time there were twelve producing wells upon the premises, constructed at great cost. Thus more than two years had expired since the execution of the Walton leases without a hand being raised toward developing the premises by the holders thereof, during which time they stood by and saw the leaseholds grow in value as if by magic by reason of the labor, skill, energy and enterprise of these respondents, and at tremendous cost.

To one capable of analyzing the conduct of men and their motives, it must be plain that the making of the deposit of the so-called "rental" in bank was inspired by the development then being mad by Wilcox, and that the purpose of the quiescence upon the part of the complainants was to have the premises tested and developed at the cost, labor and risk of others, which they were unwilling to hazard.

The conduct which will amount to such laches as will prevent the granting of relief in equity, depends upon the subject-matter and circumstances of the particular case. Where the property involved is speculative in character and subject to rapid fluctuations in value, great promptness is required. And more especially is this true, where the rights of third persons may intervene.

In the case of *Huggins v. Daley*, 99 Fed. Rep., 606, from which we have previously quoted, the court says:

"There is, perhaps, no other business in which prompt performance is so essential to the rights of the parties, or delays so likely to prove injurious,—no other class of contracts in which time is so much of the essence. There is no other branch of mining where greater damage is done by delay. Coal and precious metals lie either in horizontal

veins or in pockets. They remain where they are until removed. Oil and gas are the most uncertain, fluctuating, volatile and fugitive of all mining properties. They lie far below the surface, beyond the control of human will, whence they may flow unrestrained, if the owner of adjoining land bores a well down to the strata which holds them; and there is no law which can provide adequate, if indeed any, compensation for such results. This is a matter of common knowledge, and courts will generally take notice of whatever ought to be generally known within the limits of their jurisdiction."

Applicable to this phase of these cases is the text of the *Cyclopedia of Law and Procedure*, Vol. 16, page 161, supported by numerous authorities there cited:

"The speculative character of the property involved is an important element in considering the effect of the delay in asserting a right thereto, and more than ordinary promptness must be displayed to avoid the charge of *laches* in such case. This is but one phase of a broader principle, that one may not withhold his claim, awaiting the outcome of an enterprise, and then, after a decided turn has taken place, assert or renounce his interest in accordance with the result. Accordingly, a marked appreciation or depreciation, according to circumstances, in the value of property involved, when the right might have been asserted before such change, will prevent the granting of relief."

Again on page 162:

"The most frequent case of *laches* consisting of delay working prejudice to the defendant through change in circumstances, is where plaintiff has slept on his rights and permitted defendant to make valuable improvements on the property in controversy, or to make large expenditures in reliance on his title thereto. This is usually sufficient to bar relief."

And again on page 163:

"Equity is equally careful to avoid injustice to third persons as to parties, and therefore will deny, for *laches* the claim of one who has slept on his rights until the third persons have acquired rights which would be affected by granting him relief."

Applicable also to this contention are the words of Mr. Justice Patterson of the United States Supreme Court, in the case of *Hollingsworth v. Fry*, 4 Dall., 345, bot. page 347, Book 1, Law Ed. 860, 861, as follows:

"In cases of the present kind, equity will not suffer a party to lie by till the event of the experiment shall enable him to make his election with certainty of profits one way, and without loss any way. This mode of procedure is unfair, contrary to natural justice and in exclusion of mutuality."

Applicable also are the words of Mr. Justice Miller in the case of *The Twin-Link Oil Co. v. Marbury*, 91 U. S., 593, 23 Law Ed. 331:

"The fluctuating character and value of this class of property is remarkably illustrated in the history of the production of mineral oil from wells. Property worth thousands today is worth nothing tomorrow; and that which today would sell for \$1,000, as its fair value, may, by the natural changes of a week, or the energy and courage of desperate enterprise in the same time be made to yield that much every day. The injustice, therefore, is obvious of permitting one holding the right to assert an ownership in such property to voluntarily await the event, and then decide, when the danger which is over, has been at the risk of another, to come in and share the profits.

"While a much longer time might be allowed to assert

this right in regard to real estate whose value is fixed, on which no outlay is made for improvement, and but little change in value, the class of property here considered, subject to the most rapid, frequent and violent fluctuations in value of anything known as property, requires prompt action in all who hold an option whether they will share its risk or stand clear of them."

In the case of *Iron Co. v. Trout*, 83 Va., 409, 2 S. E. Rep., 713, in speaking of the forfeiture of a lease for the mining of solid minerals, because of the *laches* of the lessee, the court says:

"The lease was for a term of twenty years. Yet looking to its nature and object, it can not be contended that the lessee had the option to work or not work the ore mines for an indefinite time, and thus convert what was designed to yield a handsome daily income to the lessor into a mere barren encumbrance on his land—a cloud on his title,—an incubus and a manacle which would oppress him and destroy the market value of his land. No lease of land for rent for a return to the landlord out of the land which passes, can be construed to be intended to enable the tenants to merely hold the lease for the purpose of speculation, without doing and performing in connection therewith what the lease contemplated. *Such a construction would, indeed, make all such contracts a snare for the entrapment and injury of the unwary landlord.*"

In the case of *Venture Oil Co. v. Fretts*, 152 Pa. St., 451, the Supreme Court of Pennsylvania uses this language:

"The agreement of December 20th, 1864, contemplates the production of oil and the return to the lessor of rent or royalty out of the oil produced. It must, therefore, be construed with reference to the known character of the oil business, and the evident intention of the parties. The covenant to commence operations within six months, etc.,

is not performed by commencing and then indefinitely suspending operations; but operations begun within the time limit must be prosecuted in the manner in which the business is ordinarily conducted, until the search for oil is ended, either by finding it and operating the territory or failing to find it and surrendering the possession."

In the case of *Munroe v. Armstrong*, 96 Pa. St., 307, it was held that a cessation of operation for thirty days terminated the lease. In the opinion, on page 310 the court said:

"An oil lease yields nothing to the land owner when not worked, and is an incumbrance on his land, tying his hands against selling or leasing to others; but when idle, it costs the lessee nothing and is valuable, or may prove valuable, if he can hold it awaiting developments in its vicinity. If a well be productive, it is in the interest of both lessor and lessee that it be continuously operated till its exhaustion, but if dry, it is of no value. Holding on to a lease after ceasing search is often for the purpose of speculation, the thing which a prudent land owner guards against. *Forfeiture for non-development or delay is essential to public and private interests in relation to the use and alienation of property.*"

In the case of *Huggins v. Daley*, *supra*, a delay of eight months was held to be unreasonable.

In the case of *Federal Oil Co. v. Western Oil Co.*, *supra*, a delay of eight months was held to be unreasonable.

And in the case of *Cassel v. Crothers*, 193 Pa. St., 359, the shutting down of a well by the lessee "for the winter" terminated the lease.

It will be seen from the foregoing citations, that "oil law" favors the faithful driller and does not sanction the claim of an adventurer who lies by to appropriate the enterprise of

another. And while there is much more reason for the rule in cases of this kind because of the character of the property involved—its violent fluctuations in value, the fugitive tendency of these substances rendering them liable to be lost by drainage through wells on other lands, the rule for which we are now contending has been applied by the courts with much vigor where property of a more stable character was involved.

In the case of *Johnson v. Standard Mining Co.*, 148 U. S., 360, 37 Law Ed., 480, a bill in equity to establish an interest in a mining lode, was dismissed upon the ground of *laches*. In the notes preceding the opinion are the following:

“A party will not be permitted to delay to enable him to speculate on a chance of an appreciation in value of property, and elect to proceed only where it would be profitable to do so.

“A person will not be permitted to remain passive, prepared to affirm the transaction if it should be advantageous to him, or repudiate it if unprofitable.”

In the opinion, Mr. Justice Brown uses the following language:

“The duty of inquiry was all the more peremptory, in this case from the fact that the property of itself was of uncertain character, and was liable, as in most mining property, to suddenly develop an enormous increase in value. This is what actually took place in this case. A property which, in October, 1880, plaintiff sold to Chatfield upon the basis of \$4,800, for the whole mine is charged in the bill filed October 21, 1887, to be worth \$1,000,000, exclusive of its accumulated profits. Under such circumstances, where property has been developed by the courage and energy and at the expense of the defendants, courts will look with disfavor upon the claims of those who have lain idle while awaiting the results of this devel-

opment, and will require not only clear proof of fraud, but prompt assertion of the plaintiff's rights. • • •

"We think it is clear that the plaintiff did not make use of that diligence which the circumstances of the case called for, and the decree of the court below dismissing his bill, is therefore affirmed."

Quite pertinent to this subject is the text in Am. and Eng. Encyc. of Law (1st Ed.) Vol. 22, p. 1043, as follows:

"Diligence is expected of all who seek equitable relief. One who disregards the rights of others by unnecessary or unreasonable delay in performing his obligation under a contract, thereby loses the right to require performance of the other party. Where time is in any degree an essential element, his *laches* will render a decree in his favor inequitable. Delay either in performing his duty or in bringing suit to enforce his rights will endanger his case and justify a court of equity in refusing to give him a hearing.

" 'It may be laid down as an acknowledged rule in courts of equity,' says Chancellor Kent, 'that where the party who applies for specific performance has omitted to execute his part of the contract by the time appointed for that purpose, without being able to assign any sufficient justification or excuse for his delay; and where there is nothing in the acts or conduct of the other party that amounts to an acquiescence in that delay, the court will not compel a specific performance.' If, while he has been sleeping on his rights, the interest of third parties has intervened, he will be estopped from claiming a specific performance against them. If he has failed to assert his claim and has permitted innocent purchasers to come into possession and make improvements while he has stood by in silence, he will be deemed to have waived and lost his equitable interest."

In the note under the above, under the topic, "Change of Circumstances," will be found the following:

"One who desires to enforce specific performance of a contract for the purchase of land, must present his claim without any unnecessary delay, and while affairs remain in such a condition that the performance can be enforced without injury to others, and must not have done any act that is incompatible with his claim for performance.—*Porter v. Daugherty*, 25 Pa. St., 405."

"For, if while he is delaying in the fulfillment of his obligation, the value of the property or the circumstances of the parties have changed so that it may prove unfair to others to compel the performance, it will not be enforced."—Citing many authorities, among which are: *Mundy v. Davis*, 20 Fed. Rep., 355; *McKay v. Corrington*, 1 McLean (U. S.) 50; *Brashier v. Gratz*, 6 Wheat. (U. S.) 528; *Holgate v. Eaton*, 116 U. S., 33; *Shortall v. Mitchell*, 57 Ill., 161; *Young v. Daniels*, 2 Iowa, 126, 63 Am. Dec., 477; *Green v. Covilland*, 10 Cal., 317, 70 Am. Dec., 725.

"Time is frequently considered not of the essence of an agreement to convey lands; but in all cases where the value of the property has materially changed, or where great financial changes have materially altered the relative value of money or land, time will be considered material, and a party will not be allowed to lie by until the change sets in his favor and then ask specific performance.—*Merritt v. Brown*, 19 N. J. Eq., 286."

"Specific performance of an agreement to convey land by warranty deed, will be refused if there has been a delay of six months, when the value was rapidly increasing.—*Chicago, etc. Co. v. Stewart*, 19 Fed. Rep., 5."

Under the circumstances of this case, and in view of the character of the property involved, upon the authorities as well as upon reason, it seems clear that because of the *laches* of the

complainants a court of equity should refuse to reward the designed indolence of the petitioners, at the expense of the respondents through whose courage, energy, industry and enterprise and at whose cost of much labor and money this property has been made immensely valuable. To grant the relief prayed for would be unconscionable, and would shock every sense of right and justice.

PROPOSITION IX.

Amity Between State and Federal Courts.

Instruments of the character of those involved in these cases relate to property and affect titles, and when construed by the highest courts of a state, that construction fixes the legal status of such instruments and becomes a rule of property in that state, which the Federal Courts will recognize and follow.

The rule stated in the above proposition is general in its scope and application and is based upon public policy, and we are not without eminent precedent in its application to the questions involved in this litigation. Not only has the rule been applied to oil and gas as "property," but likewise to the construction of leases of this character as to their legal *status*, and effect.

In the case of *Huggins v. Daley*, 99 Fed. Rep., 606, 48 L. R. A., 320, the U. S. Court of Appeals, Fourth Circuit, in this relation, says:

"Numerous cases were cited—among them those from West Virginia which this court held to lay down rules of property stating the controlling doctrine peculiar to mining leases in that state which the Federal Courts will recognize and follow."

In the case of *Ohio Oil Co. v. Indiana*, 177 U. S. 190, 44

Law Ed., 729, the Supreme Court, by Mr. Justice White said:

"The doctrine that a land owner, although entitled to bore wells for natural gas and oil, has no title to those substances as owner until they are actually reduced by him to possession, is settled as a rule of property in the state of Indiana."

In the case of *Foster v. Elk Fork Oil & Gas Co.*, 90 Fed. Rep., 178, at p. 182, the court says:

"The contract we are construing is a contract made and to be performed in West Virginia. It is a contract relating to land in that state. The cases quoted lay down a rule of property, stating the controlling doctrine peculiar to mining leases in that state. *The Federal Courts recognize and follow the decisions of courts of last resort in the state.*"

In the case of *Federal Oil Co. v. Western Oil Co.*, 121 Fed. Rep., 674, 675, the U. S. Circuit Court of Appeals, of our own circuit, by Judge Jenkins, said:

"The nature of property in natural gas and oil contained in the earth, and the legal effect of the instrument here in question (a gas and oil lease) have been settled authoritatively by the rulings of the Supreme Court of Indiana."

The above will be sufficient to show the application of the rule to the questions involved in the cases at bar. Assuming, as we confidently do that the rule as above stated will be observed by this court, it will very much simplify the questions here involved to determine whether these questions "have been settled authoritatively" by the rulings of the Supreme Court of Illinois.

PROPOSITION X.*The Rule In Illinois.*

It has been established, as a rule of property in the state of Illinois, by the Supreme Court of that state, that a lease of the character of those involved in these cases, vests no present title in the lessee, but is a mere option, or license, which the grantor may withdraw at any time before the grantee has done some act by which he binds himself to perform the optional provisions of the lease.

On February 20, 1908, in the case of *Poe v. Ulry*, 233 Ill., 56, 84 N. E. Rep., 46, the Supreme Court of Illinois refused to cancel and annul a lease of this character in an action brought for that purpose by the owner of the land. In that case the lessee had performed every express covenant of the lease even to the extent of making the test provided for which resulted in the finding of gas.

Later, on October 26, 1908, in the case of *Cortelyou v. Barsdall*, 236 Ill., 138, 86 N. E. Rep., 200 the same court did cancel and hold void a lease of this character in an action brought for that purpose by the owner of the land. In that case, as in the case at bar, the lessee had not taken possession of the premises under the lease and, therefore, had acquired no vested rights by the expenditure of money or labor, or by finding oil or gas. In that case the court held:

"A lease for mining for oil and gas, which grants to the lessee the right to mine for oil and gas so long as the same is produced and the royalty and rentals are paid, but which does not bind the lessee to perform any obligation, is a mere option, which the lessor may withdraw before the lessee has done some act by which he binds himself to exercise the option."

On the same day on which the *Poe-Ulry* case was decided,

the same court decided the case of *Watford Oil and Gas Co. v. Shipman, et al.*, 233 Ill., 9, 84 N. E. Rep., 53. That was an action brought by one holding a lease, in legal effect, like those here involved to enjoin a subsequent lessee from operating on the premises, and for other relief. In that case, the complainant had not taken possession of the premises but had paid the first installment of "rental" and had tendered the other payments as they became due. The court held that the lease was not enforceable in a court of equity for want of mutuality and that the bill was properly dismissed for want of equity.

Later, Dec. 15, 1908, in the case of *Ulry v. Keith*, 237 Ill., 284, 86 N. E. Rep., 696, in a very well considered opinion, the Supreme Court of Illinois again held that a lease of this character was not enforceable in a court of equity at the instance of one having the power to revoke, because of a want of mutuality. And in that case, the complainant had taken possession of the premises, made development, and had acquired a vested estate by finding gas.

It will be seen from the foregoing that the Supreme Court of Illinois has determined the legal *status* of leases of this character, and has announced "*rules of property stating the controlling doctrine peculiar to mining leases in that state, which the Federal courts will recognize and follow.*"

A FEW MINOR POINTS.

In referring to the "surrender clause" contained in the leases involved in these cases, on page 3 of their brief, counsel for the petitioners inform us, among other things of like character, that, "the same surrender provision is contained in the oil leases issued by the Interior Department when leasing Indian lands for oil and gas purposes."

Counsel, however, fail to observe the requirement of Sec-

tion 3, of Rule 21 of this court, in that they fail to refer to the page of the record where confirmation of this statement may be found. The same is true of the statement in the same connection, that: "The enforceability, not to say validity of very many thousands of iron, coal, gas, and oil leases hang in the balance."

There seems to have been a tendency upon the part of the petitioners, throughout the progress of these cases to deal with abstract, or assumed, if not fanciful questions and conditions, rather than those that are real—those that, in fact, exist. This is on a level with the theory upon which a great mass of so-called "expert testimony" was admitted, and in harmony with finding No. 6 of the master's report in which none of the things described or conditions stated have any reference to these cases, but are purely theoretical and based on conditions said to exist in "many parts of the country."

If this reference to "the oil leases issued by the Interior Department," and to the "many thousands of iron, coal, gas, and oil leases," which it is said, "for many years have contained the provision which the Circuit Court of Appeals of the Seventh Circuit has in this case held fatal to their enforcement by injunction," is intended as an argument in favor of the validity of the leases involved in these cases, because of the great number of leases in which this infirmity is said to appear, then we would ask, what would be the legal *status* of the leases here involved if this infirmity appeared in none other? If this infirmity will render two leases void, in how many must it be used in order to neutralize its baleful effect?

If, however, these references were intended as an argument in favor of exercising the power of this court to issue the writs prayed for, then the answer is that the leases referred to are not involved in these cases, and may never be involved in any case. Be that as it may, it is presuming too

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much to ask this court to exercise this extraordinary power to bring these cases before it, at the expense of these litigants, and resolve itself into a moot court for the purpose of deciding a moot question.

Mutuality of Remedy.

In their petition, and likewise in their brief, counsel for the petitioners seem to assume that the only impediment to the enforcement of these leases is the want of *mutuality of remedy*, due to the presence of the "surrender clause."

While the presence of the "surrender clause" goes far to impeach the fairness of these instruments, this is, by no means, the paramount vice with which they are afflicted. They contain many infirmities even more vicious than this. The studied wording of these instruments, whereby pretenses are made to appear as promises, for the purpose of deceiving their inexperienced victims; the entire want of any obligation assumed to carry out the purposes expressed; the power given the lessee to withhold the consideration which prompted their execution, by holding the premises dormant for the purpose of gambling upon the result of development in the vicinity—all these, together with the "surrender clause," render them unworthy to be called, if indeed they are, a contract, and unfit to be enforced in any court, especially in favor of those who have availed themselves of every undue advantage they afford.

We do not contend that "*mutuality of remedy*," which is essential to the granting of relief in equity, means that both parties shall have the same kind and quality of remedy. But we do contend that both parties must have some remedy of some kind—each must be able to enforce the contract in some manner, as against the other. While in these contracts, there is no promise of any kind upon the part of the second party, except to pay the pittance called "rental," which is, in fact, penalty, and under the surrender clause, even this may be defeated, thus rendering the lessor powerless to enforce these

contracts, in any manner, against the lessee, except at the will of the latter.

AS TO THE MASTER'S REPORT.

A Few Observations.

Since the petitions herein, as well as the briefs of the petitioners, make frequent reference to the Master's Report and contain numerous quotations therefrom, apparently in support of these petitions, and in view of the fact that this report was adopted as the findings of the trial court, upon which the decrees were based, it may not be amiss to note a few of the inaccuracies, false premises and erroneous conclusions contained in this report.

As to "Large Blocks" of Leases.

Much "expert testimony" was admitted by the Master, not only to show that the leases involved are valid, equitable and enforceable, and that in order to successfully operate for oil and gas, it is necessary to have in the lease a "surrender clause," but it was also shown by the same class of testimony that it is likewise necessary to hold leases on large bodies of land, and that no one would engage in the business of "producing" without such holdings. The record discloses, however, that the entire holdings under the Walton leases did not exceed one hundred acres. According to the "experts," then, these leases were not procured in good faith for the purpose of "operating," but for some other purpose.

However, in line with this "expert testimony," in order to justify the "surrender clause," the Master finds that, "If he (the lessee) has a small amount of territory, and should discover oil near the edge of his block of leases, other operators can lease the adjacent lands, and obtain the substantial benefit of his operations."

Without considering this deduction from a legal or equit-

able point of view, from a physical standpoint it presents an anomalous situation. To avert a calamity of the sort depicted by the Master, it would be necessary to procure a "block of leases" without any "edge," or "adjacent lands," because the Master finds that "the presence of oil and gas can only be ascertained to a certainty by drilling," and if this "drilling" should show the presence of oil or gas "near the edge" of a large "block of leases," this same calamity, thus intensified, would follow. And since the Master has not enlightened us upon this point, we are left to conjecture only, as to what would be the limits of a "block of leases" that would avoid the disaster contemplated by this finding.

As another reason "which has rendered it customary for oil operators to secure as large a block of land as possible," the Master finds that "In many parts of the country it has been found impractical to drill in the winter or spring on account of the impassable condition of the country roads for heavy traffic."

The relevancy we do not see. But, since the Master has so found, we must conclude that, since "a large block of land" was not secured in this instance, the condition of the "country roads" in Crawford County, was satisfactory, and that the "*many parts of the country*" referred to was not intended to include the region of the lands in question, unless, forsooth, it may be said that the same reason has rendered it "customary" to secure *small* blocks of land in Illinois. The same reason is also assigned for the "custom" of placing a provision in the lease "for either the drilling of a well or the paying of the rental, in case of failure to drill."

If the purpose of this finding in relation to the condition of the country roads "in many parts of the country" is to excuse or justify the petitioners in their failure to make the development contemplated by the leases in these cases, then the answer is that it has not been continuous "winter" or

"spring" since the 22nd day of May, 1905, as the Master knows by physical experience, if not judicially. The condition of the country roads "in many parts of the country" was no barrier to those who acted in good faith. H. E. Wilcox found a way to complete a well on premises in the vicinity in the *spring* of 1906, within sixty days after he had procured his lease; Little & Willett completed two wells upon these premises and two on adjoining premises in the *winter* of 1906-7 after procuring their lease in September of that year, and these defendants have since completed ten wells upon the premises, making in all twelve wells that were completed, while the petitioners did nothing, during all of which time they have held a lease upon these premises which was given "for the sole and only purpose of mining and operating for oil and gas."

As to the "Surrender Clause."

But further as to this report: In said finding No. *Six*, the Master finds that "The object of the surrender clause is to allow the operator to cancel his block of leases, or any portion thereof, at any time." This is self-evident. He further finds that the "land may be tested and found unproductive of oil and gas, and the land can then be surrendered to the owner." This is likewise self-evident. But how may the land be "tested?" The Master finds that the presence of oil or gas "can only be ascertained by drilling." The same finding also states that "the rental keeps on accruing until the time of the *drilling of a well*," or the cancellation of the lease, and in a large block of leases, the expense of paying rental amounts to a great deal." The finding also states that the "object of the lease is to *explore* for oil and gas."

If this be true, what is the use of a "surrender clause" in order to avoid the payment of rentals? When this "object" has been accomplished—when the test is made—when exploration is begun—when a well is completed—this "rental" ceases by the terms of the lease without any surrender. This "sur-

render clause," then, can be of service only when the "object of the lease" is not to be complied with—when no "testing" is to be made—when no well is to be "completed"—when the lease is to be held, not for the purpose of "drilling" but for the purpose of speculation.

It must be plain to any rational mind that a lease taken in good faith for the purpose of "mining and operating" has no need of a surrender clause. And while many leases containing a clause of this kind are owned by persons who operate under them in good faith, the same would be true without such a clause. This "surrender clause" is simply an invention of the speculator whose purpose is to tie up as many tracts of land as possible to be held dormant awaiting development in the vicinity by others, and if oil be found by such development, the leases are then sold to legitimate operators for a large price, and if not found, they may be surrendered. Thus, under such leases, the holder is enabled to gamble upon the result of *bona fide* development by others in the vicinity, and at but little cost to him.

Under such a form, the unscrupulous speculator is enabled to obtain a lease from the confiding land-owner for the ostensible purpose of "mining and operating for oil and gas," for the pretended consideration of the prospective oil royalties and gas rentals to come from development and production, and then convert it into a lease for an entirely different purpose, whereby the lessor is deprived of the consideration which induced the execution of the lease, and is prevented, not only from operating upon his premises himself, but also from procuring another to do so, while the lessee, by a mere trick, has secured to himself all the advantage to be gained by the finding of oil or gas in the vicinity, without cost to him. It is a fraud of this sort that the complainants are seeking to justify by their "expert testimony," their "stipulation," their reference to "large blocks of leases," and to the condition of the country

roads "in many parts of the country." And it was to silence a pretense of this sort that Judge Brawley, in the case of *Higgins v. Daley*, *supra*, so aptly said:

"The proof is clear that he never intended to drill a well within the time stipulated. And the proviso was written by the lessee evidently for the purpose of deception. He knew that the object of the lessor was to secure diligent search for oil, and he was 'keeping the word of promise to the ear, and breaking it to the hope,' skillfully turning it into a mere speculative lease, binding the lessor, and leaving himself free. It would be unconscionable to hold the lessor bound. 'Law, as a science, would be unworthy of the name, if it did not, to some extent, provide the means of preventing the mischiefs of improvidence, rashness, blind confidence and credulity on the one side, and of skill, avarice, cunning, and gross violation of the principles of morals and conscience on the other.' "

And yet, the Master concludes that, "Since the object of the lease is *to explore for oil and gas*, it does not appear that after the field has been *tested* and found *unproductive*, that the presence of the surrender clause is an inequitable provision."

To what "field" does the Master refer? The petitioners have "tested" no field. The "field" in question in this case, was tested by others. May the petitioners appropriate the enterprise of these respondents in order to excuse a non-compliance with the express purpose of their lease? May their default be thus condoned?

Nor was the field in question found to be "unproductive." In the field involved in this case, none of the conditions described by the Master are shown to exist. And yet, upon the conditions found to exist in "many parts of the country," as stated in his finding No. *Six*, the Master bases his conclusion of law No. *One*, "That the oil and gas leases entered into between M.

A. Walton and James A. Smith and Susannah Smith on the 22nd day of May, A. D., 1905, are valid, enforceable contracts, entered into for a valuable consideration, and binding between the parties."

It is marvelously strange, indeed, if all of the courts that have passed upon these questions during the last half century, with their combined learning, wisdom and experience, are *wrong*, and the Master alone is *right*.

Offsetting Infirmities.

One can not read the Master's report without being impressed with the fact that it was made under a misconception of the law as well as the facts in this case. To verify this statement, one needs to look only to his argument in support of his conclusions.

In reference to the rule that a court will not enforce a contract wanting in mutuality at the instance of one not bound by its provisions, after noting the fact that the lease owned by the defendants also contains a surrender clause, the Master, on page 17 of his original report (page 441 of the Record) says:

"That this rule would be followed between two rival lessees or assignees of such leases, each claiming under a separate lease containing the same vice or infirmity, to the Master seems exceedingly doubtful."

Thus, it appears that the Master has offset "infirmities." Apparently drawing his inspiration from the argument in the brief filed before him by the petitioners herein, he seems to think that the "vice and infirmity" in the lease sought to be enforced, is cured by a like "vice and infirmity" in a lease which no one is seeking to enforce. Not only so, but he does not take into account the fact that the "vice and infirmity" contained in the lease not in question in this case, was cured by active, effective and good faith performance—the very per-

formance which was sought to be enjoined in this case, by those who base their right of action upon a lease in which this "vice and infirmity" has not been cured. If, then, the validity or enforceability of the lease sought to be enforced in this case could be determined by comparison in this manner, the conclusion would fail because the premises are not sound.

Illinois Cases Distinguished (?)

Again in this connection, in seeking to distinguish the Illinois cases from the cases at bar, the Master says:

"Both the Illinois cases, viz: *Watford Oil and Gas Co. v. Shipman*, 233 Ill., 9, and *Ulry v. Keith*, 237 Ill., 284, that have passed upon this point have been cases wherein the suit was between the lessor and the lessee, in which case the rule therein declared would doubtlessly apply."

And further, the Master on this point says:

"If, then, the presence of the surrender clause in the lease is a bar to complainants' suit for injunction, it must be because the owner of the land, the complainants' lessor, is a party to the suit. He is, however, while probably a necessary party, only a nominal one, and the relief required against him is not of a such a character that it could be said that he was enjoined from violating his contract with the complainants."

This reasoning is erroneous both in point of fact and law. In point of fact, in the cases referred to, the suits were no more between the lessor and the lessee, than are the cases at bar. They were, in fact, and to all intents and purpose, between rival lessees. If the lessors are but nominal parties in these cases, they were equally so in the cases referred to. In the *Watford* case, the writer was of counsel for L. G. Neely and others, who were subsequent lessees, and they were the principal defendants in both courts. The complainant was a prior

lessee who brought the action against the lessor and the subsequent lessee to enjoin operation on the premises under a subsequent lease, as a reading of the decision will show.

The Ulry-Keith case was also one between rival lessees. The action was brought by a prior lessee against the lessor and one Everett Keith, a subsequent lessee, to enjoin an alleged trespass by the subsequent lessee. The bill alleged that the owner of the land had entered into an agreement with one Everett Keith by which the said Keith was to drill on the premises for oil and gas, and that he had entered upon said premises with a rig and drilling outfit, and was proceeding to drill a well for the production of oil and gas, and declared his purpose and intention, if he found oil and gas in paying quantities, to convert the same to his own use, and this would be an irreparable damage to the complainants. It was this alleged trespass that was sought to be enjoined.

While the owner of the land was made a party in each of the cases referred to, no affirmative relief—no personal judgment—was asked against them by way of an accounting and the recovery of money, as is true in the cases at bar. If the owner of the land was not enjoined "from violating his contract" in the case at bar, it would be interesting to know upon what theory he was enjoined at all, and if merely a nominal party, as stated for the purpose of the distinction sought to be made by the Master, how can he justify the judgment in *personam* which he recommends?

The Master's error as to the facts in the cases referred to by him must be due to the fact that he received his information second hand, and with such a meagre knowledge of those cases and the decisions rendered, it is difficult to see how he could, with any degree of accuracy, conclude that they do not apply to the cases at bar. The case of *Federal Oil Co. v. Western Oil Co.*, *supra*, decided by Judge Baker, and the same case

decided by the Circuit Court of Appeals, was also between two rival lessees, and in which the rule was applied. These cases, with many others of like character were cited before the Master, and if read, should have set him right upon this subject.

The legal conclusion stated by the Master is equally erroneous. The reason for the rule that such contracts will not be enforced in favor of one not bound by its provisions, is not because the parties to the contract are parties to the suit, but it is because of the inherent infirmity of the contract itself, which operates upon him who bases his demand for relief upon a contract by which he, himself, is not bound. This infirmity renders such a contract impotent in the hands of him who seeks to enforce it in a court of equity; it furnishes no basis upon which to demand equitable relief against any one.

"Contract Relation."

In this relation, on page 17 of his original report, (page 441 of the Record) the Master says:

"There is no contract relation between the rival lessees. So far as either of them is concerned, the prior lease has the better title. There is no relation between them, whereby the question of specifically performing anything could possibly exist. Between them, it is simply a question of which one, as against the right of the other, is a trespasser."

This reasoning of the Master that, because there are no "contract relations" existing between the complainants and certain of the defendants, the complainants are thereby relieved from showing a meritorious cause of action—a right to the relief demanded—is so glaringly fallacious as to not merit notice except for its novelty.

Suppose, for illustration, that in a case like this, the complainant, having no lease or contract of any kind, but as a mere volunteer, goes into a court of equity to enjoin a tres-

pass by one who likewise is without authority. Here no "contract relation" would exist between the parties, but would the complainant have any standing in court? Would the chancellor compare "infirmities" and finding them equal, hold that the want of a *right of action* is cured by the want of a *defense*?

In such a case, would it be necessary for the defendant to show a better right to the possession of the premises than the complainant has, and, failing in this, would the complainant prevail? Or would it not be incumbent upon the complainant to show the existence of a right violated, or threatened—a satisfactory title to the *locus in quo*—before he could be heard in a court of equity? If such an action could not be maintained by one having *no* contract, would his case be different if based upon a *void contract*, or contract which is *not enforceable*? Will a void contract, or one which is impotent as between the parties to it, support an action as against a stranger?

The Master's conclusion in this respect, is certainly a revelation, to say the least. He seems to think that in an action of this kind, *before relief should be denied*, there must not only be a contract relation existing between the parties, but that relation must rest upon a void contract, or a contract which is not enforceable. And unless this paradoxical condition exists, the relief will be granted! Here are his own words in this respect:

"There is no contract relation between them that a court of equity could say is so lacking in mutuality as to bar a bill for specific performance, and unless this element exists, it does not appear on what grounds relief should be denied."

In other words, relief will be denied if there is a contract between all of the parties to the suit that "is so lacking in mutuality as to bar a bill for specific performance;" but if the complainant has such a contract with certain of the defendants only, or with some other person, or has no contract

at all, then the relief will be granted! In this, in one sense, the Master is consistent, because this is the ultimate conclusion and final effect of his report. And upon this report, so wrought out, the decrees were based!

One More Correction.

In his report, on page 23, (page 445 of the Record) after referring to certain cases in which relief by injunction was granted, where, by reason of the nature of the cases, specific performance could not be enforced, the Master says:

“A number of cases have been cited by the defendants, which, it is claimed, hold contrary to these, but in all cases, they were bills praying for specific performance, and not for an injunction against the breach of a contract.”

This statement is inaccurate in more respects than one. In the first place, there was no claim by the defendants that the cases cited by them hold contrary to those referred to by the Master, because the cases referred to by him were radically different in character and in subject-matter from those cited by the defendants.

Since it seems that we were unable to make our position on this subject clear in the court below, we wish here and now to say with emphasis, lest we again be misunderstood, that we have never contended that in no instance will a contract be enforced negatively by enjoining its breach, which can not be enforced by the affirmative remedy. But what we do say is, that if because of the character of the contract itself, a court could not enforce it as against the complainant—the actor in the suit—if the action were reversed, because of a want of any obligation assumed, then the court will not enforce it as against the other party, either by decreeing its specific performance or by enjoining its breach. But if the contract be such as would be enforced against the complainant, but because of the nature of the subject-matter, it can not be specifically enforced as

against the other party, then the negative remedy may be applied, if the equities of the case require it. The rule for which we contend is clearly stated in Pomroy's Equity Jurisprudence, in Sec. 1314, thus:

"An injunction restraining a breach of a contract is a negative specific enforcement of that contract. The jurisdiction of equity to grant such an injunction is substantially coincident with its jurisdiction to compel a specific performance. Both are governed by the same doctrine and rules. It may be stated as a general proposition, that whenever the contract is of such a class, *which will be affirmatively specifically enforced*, a court of equity will restrain its breach by injunction, *if this is the only practical mode of enforcement which its terms will permit.*"

Nor is it an accurate statement of the facts that all of the cases cited by the defendants "were based on bills praying for specific performance, and not for an injunction against the breach of a contract."

In our brief filed with the Master, we cited 19 authorities upon this proposition, none of which, but three—*Marble Co. v. Ripley*, *supra*, *So. Express Co. v. Western N. C. R. R. Co.*, *supra*, and *Rust v. Conrad*, *supra*,—"were based on bills praying for specific performance." Among the cases to which attention was called, were *Watford Oil and G. Co. v. Shipman*, 233 Ill., 9; *Ulry v. Keith*, 237 Ill., 284; *Welty v. Jacobs*, 171 Ill., 624; *Chicago, etc. Co. v. Town of Lake*, 130 Ill., 42; *East St. L. Ry. Co. v. City of E. St. Louis*, 182 Ill., 433; *Federal Oil Co. v. Western Oil Co.*, 112 Fed. Rep., 373,—by Judge Baker—and *Federal Oil Co. v. Western Oil Co.*, 121 Fed. Rep., 674—by The Circuit Court of Appeals, *Iron Age Pub. Co. v. Western U. Tel. Co.*, 83 Ala., 498; *Fowler Utility Co. v. Gray*, 168 Ind., 1, and many others, all of which were clear-cut bills "for an injunction against the breach of a contract," as the cases themselves will show—the statement of the Master to the contrary, notwithstanding.

If we, alone, had been misunderstood by the Master, we would feel that we were at fault. But since all of the authorities cited were likewise apparently misunderstood, and were misapplied, we must conclude that this result was, at least, not wholly due to our failure to make our meaning clear.

We call attention to these matters, not because we regard them as important within themselves, nor because we take pleasure in doing so, but in confirmation of our contention that the Master's report was made under a misconception of the law and the facts, and without the careful consideration which the importance of these cases would warrant, especially by one not familiar with the questions involved.

And even so, if this report had not been adopted as the findings of the court below, we would have been disposed to pass it by unnoticed. But since it was so adopted, it became the decision of the trial court, and it is as such that we assail it here. By adoption, it became the foundation upon which the Decrees were predicated, and we would be derelict in the discharge of the duty we owe to ourselves, to our clients and to this court, did we not point out at least some of the inaccuracies, false premises and erroneous conclusions upon which the Decrees in these cases rest.

The pages of this argument have been multiplied by our endeavor to make ourselves understood here, and to place these cases before this court in their true light. And, to lighten the labors of the court in the examination of the authorities cited, we have copiously quoted from many of these authorities. If in these respects we have, in a measure, succeeded, we feel rewarded for our effort, and with confidence submit this case.

Respectfully submitted by

JAY A. HINDMAN,
Solicitor for Respondents.

HARTFORD CITY, INDIANA.

January 2, 1913.

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